

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-7245

United States Court of Appeals
For the Second Circuit

J. P. FOLEY & Co., Inc., JOHN P. FOLEY,
ANNE A. FOLEY and ANITA SALISBURY,
Plaintiffs-Appellees,
against

OLIVER D. VANDERBILT, JAMES B. RAMSEY, JR., THOMAS MC-
NELL, BRUCE RAYMOND, RICHARD McDERMOTT, WILLIAM
GROSSCRUGER, FRANK LYNCH, GEORGE MORPURGO, MELVILLE
H. IRELAND, JAMES J. RUSH and BLAIR & Co., INC.,
Defendants,
ARTHUR YOUNG & COMPANY,
Defendant-Appellant.

**On Appeal from the United States District Court
for the Southern District of New York**

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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JA 1

Relevant Docket Entries

United States District Court for the
Southern District of New York

<u>Date</u>	<u>Proceedings</u>
September 28, 1970	Filed Complaint, issued summons.
January 23, 1975	Filed Defendant Arthur Young & Company's Affidavit and Notice of Motion for an order disqualifying firm of Milberg & Weiss from representing plaintiffs at trial of action, returnable February 7, 1975.
January 23, 1975	Filed Memorandum of Defendant Arthur Young & Company in support of motion for an order disqualifying counsel for plaintiffs.
March 17, 1975	Filed Affidavit of Leonard Feldman for Plaintiffs in support of [sic: opposition to] Defendant Young's motion to disqualify firm of Milberg & Weiss from appearing as plaintiffs' lawyers.
March 17, 1975	Filed Plaintiffs' Memorandum in opposition to motion to disqualify Milberg & Weiss.
March 17, 1975	Filed Affidavit of Edward N. Costikyan for Plaintiffs in opposition to motion of Defendant Arthur Young & Company to disqualify law firm of Milberg & Weiss as plaintiffs' trial counsel.
March 31, 1975	Filed Reply Affidavit of David Hartfield, Jr., in reply to plaintiffs' papers opposing Arthur Young's motion to require firm of Milberg & Weiss to leave trial of action to other qualified counsel.

JA 2

Date

Proceedings

April 3, 1975

Filed Plaintiffs' Reply Affidavit
of Lawrence Milberg in reply to
suggestion found in Mr. Hartfield's
affidavit.

April 16, 1975

Filed Opinion #42253. Defendant's
motion for disqualification is denied.
So ordered. Tenney, J. (Mn).

April 23, 1975

Filed Notice of Appeal.

Notice of Motion to Disqualify Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
J.P. FOLEY & CO., INC., JOHN P. :
FOLEY, ANNE A. FOLEY and ANITA
SALISBURY, :

Plaintiffs, : NOTICE OF MOTION
-against- : 70 Civ. 4194 CHT

OLIVER D. VANDERBILT, JAMES B. :
RAMSEY, JR., THOMAS McNELL, BRUCE
RAYMOND, RICHARD McDERMOTT, WILLIAM :
GROSSCRUGER, FRANK LYNCH, GEORGE
MORPURGO, MELVILLE H. IRELAND, :
JAMES J. RUSH, BLAIR & CO., INC.,
and ARTHUR YOUNG & COMPANY, :

Defendants. :

----- x

PLEASE TAKE NOTICE that upon the annexed affidavit of Jeffrey A. Barist, sworn to January 21, 1975, and upon all proceedings heretofore had herein, defendant Arthur Young & Company will move this Court before the Honorable Charles H. Tenney on the 7th day of February, 1975, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at Room 1904, United States Court House, Foley Square, New York, New York, for an order, pursuant to the Court's general equitable powers and supervisory powers over attorneys, and Rule 4(c) of the General Rules of this Court and Rule 15 of the local Civil Rules of this Court, disqualifying the firm of Milberg & Weiss from representing the plaintiffs at the trial of this action,

Notice of Motion to Disqualify Counsel for Plaintiffs

and for such other and further relief as the Court may
deem just and proper.

Dated: New York, New York
January 21, 1975

Yours, etc.

WHITE & CASE

By Jeffrey A. Bencit
A Member of the Firm
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TO: Milberg & Weiss
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Attorneys for Defendants
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McDermott, Grosscruger,
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Fried, Frank, Harris,
Shriver & Jacobson
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New York, New York 10005

Cadwalader, Wickersham & Taft
Attorneys for Defendant
Raymond
One Wall Street
New York, New York 10005

Affidavit of Jeffrey A. Barist in Support of
Motion to Disqualify

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

J.P. FOLEY & CO., INC., JOHN P. FOLEY, :
and ANNE A. FOLEY and ANITA SALISBURY,

Plaintiffs,

-against-

: AFFIDAVIT IN
: SUPPORT OF
: MOTION TO DIS-
QUALIFY

OLIVER D. VANDERBILT, JAMES B. RAMSEY,
JR., THOMAS McNELL, BRUCE RAYMOND, :
RICHARD McDERMOTT, WILLIAM GROSSCRUGER,
FRANK LYNCH, GEORGE MORPURGO, MELVILLE
H. IRELAND, JAMES J. RUSH, BLAIR & CO.,
INC. and ARTHUR YOUNG & COMPANY, :

Defendants. :

----- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeffrey A. Barist, being duly sworn, says:

I am a member of the firm White & Case, attorneys
for defendant Arthur Young & Company ("Arthur Young"), and
submit this affidavit in support of defendant's motion for
an order disqualifying Milberg & Weiss as plaintiffs' trial
counsel.

This action stems from a transaction between
plaintiffs (collectively "Foley") and Blair & Co., Inc.
("Blair"), a brokerage firm now in liquidation. Arthur
Young was Blair's independent auditor and did not parti-
cipate in any of the negotiations of the Foley-Blair
agreement.

*Affidavit of Jeffrey A. Barist in Support of
Motion to Disqualify*

Background Facts

Plaintiffs commenced their negotiations with Blair in late January or early February, 1970, and the negotiations continued until agreements were signed on April 3, 1970. Foley was represented through these negotiations by Leonard Feldman, Esq., then, as now, counsel to Milberg & Weiss, Foley's attorneys in this action. (Foley Dep. 87, 113)*. Following the completion of the deposition of Foley and Feldman (a completion delayed by plaintiffs' unwarranted assertion of attorney-client privilege), it became apparent that Mr. Feldman's testimony was essential to plaintiffs' case, and in discussions with plaintiffs' counsel we were advised that plaintiffs intend to call Mr. Feldman as a witness on their behalf. By letter dated May 20, 1974 (Exhibit 1), we, as counsel for Arthur Young, advised Milberg & Weiss that in our opinion the Code of Professional Responsibility precluded the firm from acting as trial counsel under these circumstances. We have since been advised by Milberg & Weiss that they nevertheless intend to remain as trial counsel and that in their opinion the Code does not preclude their so acting.

The Court is respectfully referred to the memorandum of law submitted herewith. This affidavit is

* References are to the transcripts of depositions taken in this action. Copies of all transcript pages referred to herein are attached hereto collectively, in order of reference, as Exhibit 4.

*Affidavit of Jeffrey A. Barist in Support of
Motion to Disqualify*

intended to set forth certain of the pertinent facts in regard to Mr. Feldman's involvement in the transaction, and the reasons why this motion should be granted.

The Foley-Blair Transaction

It is undisputed that negotiation of the transaction now complained of was commenced in late January or early February, 1970, that the transaction was consummated on April 3, 1970, and that Arthur Young was a stranger to the negotiations. It is further undisputed that throughout the negotiations Foley was represented by Mr. Feldman, then, as he is now, of counsel to Milberg & Weiss. It is also undisputed that Foley authorized Feldman, as his agent, to attend meetings which Foley did not attend. (Foley Dep. 386-388) Analysis of the deposition record here establishes that Mr. Feldman had communications either by telephone or through meetings with representatives of Blair on the following dates, none of which were attended by Foley: February 9, February 19, February 24, February 25, February 27, March 3, March 6, March 10, March 11, March 13, March 16, March 17, March 18, March 19, March 23, March 24, March 25, March 26, and March 31, 1970.

The importance of these meetings and communications by Feldman, as agent for plaintiffs, with Blair representatives establishes the crucial nature of Mr. Feldman's testimony. Plaintiffs claim that this case involves "non-disclosures". Thus, essential to plaintiffs' prima facie case

*Affidavit of Jeffrey A. Barist in Support of
Motion to Disqualify*

is proof that plaintiffs or their representative, Leonard Feldman, were not in fact informed of things which they now claim they did not know.

The plaintiffs have recognized the crucial nature of Mr. Feldman's testimony, not only by stating he will be their witness at trial, but also by finally abandoning any claim of attorney-client privilege as to Foley-Feldman communications. In asserting that Foley-Feldman communications were protected by the attorney-client privilege, plaintiffs argued that Feldman was a mere scrivener. As this Court will remember, throughout the first round of depositions of Foley and Feldman, plaintiffs asserted a blanket attorney-client privilege as to all questions which involved any communication between Feldman and Foley. Arthur Young thereupon moved this Court to compel Foley and Feldman to answer these questions. By memorandum decision dated January 14, 1974 (Exhibit 2), this Court held:

(1) That Magistrate Goettel correctly directed Foley to testify as to what Feldman learned from third parties and that defendants could question Foley regarding the substance of any comments or advice Feldman may have given Foley in the course of these discussions.

(2) That Foley could not refuse to answer questions as to the subject matter of communications between plaintiffs and Feldman.

*Affiaavit of Jeffrey A. Barist in Support of
Motion to Disqualify*

(3) That because Foley "not only gave contradictory testimony, but . . . also invoked the privilege in response to threshold questions. . . which might have aided the Court in determining the exact nature of Feldman's services and the scope of Feldman's authority", there was an insufficient record to determine whether Feldman had been acting as an attorney or as a business agent during the negotiations.

Accordingly, this Court directed that Foley be further deposed and that the Court would then determine whether Feldman's services were of a legal or business nature, and also consider whether Foley had waived the attorney-client privilege.

Following the Court's decision of January 14, 1974, as amplified in a subsequent conference requested by Mr. Weiss, in which he attempted to reargue certain aspects of the Court's decision without success, Mr. Foley's deposition was completed. Thereupon, by letter dated March 6, 1973 (Exhibit 3), plaintiffs' counsel advised the Court "that the claim of attorney-client privilege in this case will be withdrawn and we therefore advise Your Honor that the motion to compel plaintiffs' answers is moot". This Court's rejection of plaintiffs' original blanket claim of privilege, and plaintiffs' abandonment of the attorney-client privilege altogether, is evidence of Feldman's pivotal involvement in the transaction.

*Affidavit of Jeffrey A. Barist in Support of
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The Feldman Role

There can be no question here that Mr. Feldman was an integral participant in the transaction and a witness whose testimony is crucial to plaintiffs' case. For example, basic to plaintiffs' case is the claim that they did not know information set forth in a document entitled Answers to Financial Questionnaire (Ex. 26 for Identification on the Foley Dep.). This document is required under SEC Rule 17a-5 and was referred to in the footnotes to the Statement of Financial Condition upon which plaintiffs assert reliance. Mr. Feldman, as an experienced attorney, could well be expected to check such matters of public record as SEC filings. Although Mr. Foley (232-239) and Mr. Feldman (243-244, 552-553) later claimed that they never saw the Answers to Financial Questionnaire until long after Foley had entered into the transaction, Milberg & Weiss produced a copy of it in response to Arthur Young's Notice to Produce Documents under Rule 34. Mr. Feldman's testimony that he never saw this document until after the Foley-Blair agreements had been signed will be crucial.

The importance of Mr. Feldman's testimony as to what plaintiffs were told about the financial condition of Blair is shown by the conflict between the testimony of Mr. Feldman and that of John Richardson, house counsel to Blair during the period of the Foley transaction. Mr. Richardson testified that while he and Mr. Feldman were

*Affidavit of Jeffrey A. Barist in Support of
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drafting certain crucial withdrawal provisions in the agreement, Richardson specifically informed Feldman (1) that Blair had lost an estimated \$1,000,000 to \$1,500,000 between October 1 and the end of 1969, (2) that Blair's book value as of December 31, 1969 was zero, and (3) that losses in January and February 1970 were estimated at approximately two million dollars (Richardson 84-85, 222-224). Mr. Feldman on deposition denied that Mr. Richardson ever told him this. (Feldman Dep. 554-559) Mr. Richardson's testimony, if accepted by the trier of fact, would eliminate any claim of plaintiffs in regard to Blair's net worth of the time they entered into the transaction. This conflict can only be resolved on the basis of the credibility of the witness.

As another example of an unresolved conflict in the record, plaintiffs assert in this litigation that they were not told of a planned withdrawal of securities by Melville Ireland, a director of Blair and a defendant herein. (Complaint, ¶8(e)) Mr. Richardson on deposition testified that the planned Ireland withdrawal was disclosed to Feldman, and Richardson pointed to a specific number in the Foley agreement intended to reflect the fact that Ireland was to withdraw capital from Blair. (Richardson Dep. 225) Feldman, however, testified that he had learned "subsequently" that this figure might refer "in part" to Ireland (Feldman 448), and with respect to Mr. Richardson's testimony that the figures used in the Foley agreement were intended to refer to Ireland's withdrawal and Feldman

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was so informed, Mr. Feldman said "He made up the story." (Feldman 554) Again, this conflict can only be resolved by the jury.

The pivotal nature of the testimony of Mr. Feldman at trial is also illustrated by the importance plaintiffs put on an alleged colloquy between Mr. Feldman and Mr. Richardson during the negotiation of the transaction. Allegedly, Mr. Feldman asked Mr. Richardson whether there were "any other documents that he thought I should see" before the plaintiffs entered into the transaction. (Feldman Dep. 135, 138-141, 247, 422-423, 433-434.) According to Mr. Feldman, Mr. Richardson said there were none (Id.), but under plaintiffs theory of the case, he should have disclosed on behalf of other defendants certain material documents. Mr. Feldman's testimony will be crucial to plaintiffs' ability to make out a prima facie case.

Thus, Mr. Feldman's testimony at trial will not be for purposes of confirmation, or cumulative, or as to uncontested matters. To the contrary, as evidenced by four days of depositions and almost 600 pages of transcript, Mr. Feldman is a crucial witness whose testimony will be directly contradictory to that of other witnesses to the transaction. In short, Mr. Feldman's credibility, as well as that of plaintiffs, is here directly in issue.

Despite his clear involvement in the transaction and the necessity of his testimony as part of plaintif

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case, Mr. Feldman has been actively associated with his firm, Milberg & Weiss, in the prosecution of this case since its inception. Mr. Feldman was of counsel to Milberg & Weiss in 1970, when the Foley transactions were negotiated, and he is of counsel to that firm today. (Feldman Dep. 5-6) On his deposition, Mr. Feldman testified that by the words "my office" he meant people associated with Milberg & Weiss. (Feldman Dep. 244). And when Mr. Feldman was asked whether he had discussed the Foley transaction with people at Milberg & Weiss prior to April 3, 1970, Mr. Feldman declined to answer on the grounds of attorney-client privilege, stating that "Mr. Milberg is also Dr. Foley's principal attorney in this matter." (Feldman 101, 244, 335-337)

Throughout this litigation, Mr. Feldman has taken an active, if not the leading, part in its preparation. On behalf of plaintiffs, Mr. Feldman has appeared in Court, has conducted depositions of defendants, and he has acted as counsel for plaintiffs when their depositions have been taken by defendants. He has interviewed witnesses; for example, he interviewed Dudley Luce twice shortly before Luce was deposed by Milberg & Weiss in May, 1973 (at one of those interviews at the offices of Milberg & Weiss, Mr. Luce also "ran into" Mr. Weiss, who attended the interview for part of the time). (Luce Dep. 128-132) Mr. Feldman's active participation in this case may be seen from his appearances at the following depositions conducted herein:

*Affidavit of Jeffrey A. Barist in Support of
Motion to Disqualify*

List of Depositions Conducted In This Case

<u>Witness</u>	<u>Date of Deposition</u>	<u>Counsel for Plaintiff</u>
John P. Foley	May 4, 1972 May 5, 1972 May 8, 1972 May 9, 1972 May 10, 1972 February 13, 1974 February 14, 1974	FELDMAN, Bershad FELDMAN Bershad FELDMAN FELDMAN Milberg Milberg
Leonard Feldman	March 26, 1973 March 27, 1973 April 11, 1973 March 21, 1974	Bershad Bershad Bershad Milberg
Dudley Luce	May 1, 1973 October 17, 1973	FELDMAN, Weiss Bershad
Anne Foley	March 20, 1973	FELDMAN
Anita Salisbu	March 22, 1973	FELDMAN
Oliver Vanderbilt	September 19, 1972	Milberg
James Rush	July 2, 1972 July 9, 1974	FELDMAN Milberg
James Ramsey	October 4, 1972	FELDMAN, Milberg
John Richardson	October 31, 1973 November 2, 1973	Weiss, FELDMAN Weiss, FELDMAN, Milberg
Melville Ireland	July 6, 1972	FELDMAN
Walter Olson	June 23, 1972 June 26, 1972 June 27, 1972 June 4, 1973 June 6, 1973 June 12, 1973 June 19, 1973	FELDMAN, Bershad FELDMAN FELDMAN Weiss, Bershad Weiss, Bershad Weiss, Milberg Weiss
Norman Segal	March 15, 1973	Milberg, FELDMAN
Michael Cook	April 23, 1974	Feurstein

Indeed, the direct pecuniary interest of Mr.

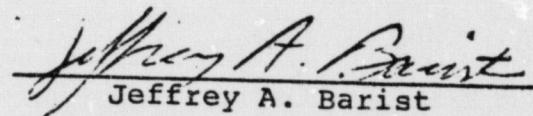
Feldman and Milberg & Weiss is involved here. Mr. Feldman

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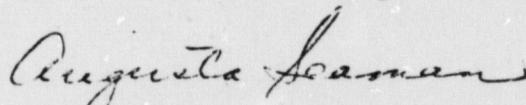
testified that he never sent Foley a bill for services rendered with respect to the Blair transaction because "the damned thing exploded" before the matter could be billed. (Feldman Dep. 567) Foley likewise testified that he had never been billed for the Blair transaction (Dep. 1101) and that he has received no bill from Milberg & Weiss in regard to this litigation and had no agreement with them as to how the firm was to be paid. (Foley Dep. 1115) Under these circumstances, it is apparent that the ultimate fee of Mr. Feldman and Milberg & Weiss, for services both before and after the start of this lawsuit, is dependent upon the result of this litigation.

Conclusion

For the reasons stated above and in the attached memorandum of law, it is respectfully requested that the motion be granted.


Jeffrey A. Barist

Sworn to before me, this
21st day of January, 1975.


Augusta Seaman

AUGUSTA SEAMAN
Notary Public, State of New York
No. 24-8895525
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

JA 16

Exhibit 1 Annexed to Affidavit of Jeffrey A. Barist
Letter from Mr. Barist to Mr. Milberg Dated May 20, 1974

FORM 28

WHITE & CASE
14 WALL STREET
NEW YORK, N.Y. 10005

JAB:HG

May 20, 1974

Arthur Young & Co.
re Foley v. Vanderbilt

Lawrence Milberg, Esq.
Milberg & Weiss
One Pennsylvania Plaza
New York 10001

Dear Mr. Milberg:

To confirm our telephone conversation of
May 17, 1974.

You advised me that plaintiffs in this matter expect to call as a witness on their behalf Leonard Feldman. I informed you that it appears to us that DR 5-102 of the Code of Professional Responsibility therefore precludes your firm from acting as trial counsel in this matter. We advise you of our view before note of issue is filed so that your clients may make arrangements for other trial counsel while there is still considerable time before trial.

Very truly yours,

J.A. Barist

Copy

JHOS

Exhibit 2 Annexed to Affidavit of Jeffrey A. Barist
Memorandum Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. P. FOLEY & CO., INC., JOHN P. FOLEY, ANTHONY J. FOLEY,
JOHN J. FOLEY, AND ANITA A. FOLEY AND
ANITA SALISBURY,

Plaintiffs, v. #70 Civ. 6193 (CHT)

-against-

#40224

OLIVER D. VANDERBILT, JAMES B.
RAMSEY, JR., THOMAS McHELL, BRUCE
RAYMOND, RICHARD MCGRATH, WILLIAM
GROSSCRUER, FRANK LYNCH, GEORGE
MORPURGO, BELVILLE H. KIRKLAND,
JAMES J. BUSH, BLAIR & CO., INC.
and ARTHUR YOUNG & COMPANY.

Defendants.

MEMORANDUM

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED
RECEIVED
CLERK'S OFFICE

TERNEY, J.

Defendant Arthur Young & Co. ("Arthur Young") moved pursuant to Fed. R. Civ. P. 37 for an order directing plaintiff John P. Foley ("Foley") to answer certain questions to which Foley had objected at his deposition. The Court referred the matter to a magistrate to hear and determine. The magistrate rendered an oral opinion in which he denied in part and granted in part Arthur Young's motion. Arthur Young has requested review and reversal of that portion of the magistrate's opinion which dealt with Foley's assertion of the attorney-client privilege. That request has been treated as a motion to reargue. For the reasons stated infra, that portion of the magistrate's opinion is modified.

Memorandum Opinion

Plaintiffs allege in their complaint that defendants Blair & Co., Inc. ("Blair"), various individuals and Arthur Young violated § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and committed common law fraud by making material misrepresentations and by failing to disclose material facts regarding the financial condition of defendant Blair during the course of negotiations leading up to a series of agreements, dated April 3, 1970, under which plaintiffs loaned Blair \$3 million. Plaintiffs have sued Arthur Young--Blair's independent auditors--claiming that they relied upon an allegedly misleading report concerning Blair's financial status which Arthur Young issued prior to the time plaintiffs entered into the agreements with Blair.

Arthur Young did not participate in any of the negotiations leading up to the signing of the agreement. It therefore sought by deposition of Foley to determine what was actually represented to plaintiffs during the negotiations, whether those representations were false and whether plaintiffs actually relied upon those representations. Upon advice of counsel, Foley refused to answer 28 questions on the ground that to compel answers would violate the attorney-client privilege. Four of the questions ("Group I") have been characterized by Arthur Young (Def.'s Memorandum of Law, Appendix) as questions having to do with the nature of the services rendered by Foley's attorney--Leonard Feldman ("Feldman"); nine of the questions ("Group

Memorandum Opinion

II") have been characterized as having to do with whether Foley consulted with Feldman regarding specific documents and agreements; ten of the questions ("Group III") have been characterized as having to do with information Feldman obtained from third parties and passed along to Foley; and five of the questions ("Group IV") can best be characterized as questions regarding the substance of certain communications between Foley and Feldman on specific occasions.

It is plaintiffs' contention that Foley (and, for that matter, Feldman) need not answer any of these questions because Feldman acted in the capacity of counsel throughout the entire course of the negotiations leading up to the April 1970 agreements. Arthur Young argues that Feldman's services during the negotiations were primarily of a business nature and that Feldman acted as Foley's business agent so that the attorney-client privilege cannot be asserted here. Arthur Young also argues that, even if Feldman acted as Foley's attorney in some respects, the matters sought to be elicited from Foley do not come within the privilege. A third argument made is that, by instituting this action, Foley has waived the attorney-client privilege.

The magistrate apparently felt that the attorney-client privilege was generally applicable but ruled that Arthur Young could pursue three lines of inquiry. First, he ruled that Foley could not assert the privilege with respect to those questions directly solely to what Feldman reported to Foley about meetings

Memorandum Opinion

Feldman had attended with representatives of Blair. The magistrate added, however, that Foley need not testify as to the substance of any comments or advice Feldman may have given Foley while making these reports. Second, the magistrate ruled that Foley could be asked whether he had obtained legal advice concerning the April 1970 agreements but that he could not be asked the substance of that advice. Finally, the magistrate ruled that it would be proper to ask Foley whether Feldman had given any business advice to him. The magistrate indicated, however, that if that question were answered in the negative, Arthur Young would be barred from pursuing that line of questioning.

The attorney-client privilege applies only if:

"(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing promptly either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and ... (4) the privilege has been (a) claimed and (b) not waived by the client." United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The privilege also extends to communications from an attorney to his client. 8 Wigmore, Evidence § 2320 (McNaughton rev. 1961); Buckley v. Vidal, 50 F.R.D. 271, 275 (S.D.N.Y. 1970). However, it does not cover an attorney's communications--whether they are in the form of information or advice--which are based

Memorandum Opinion

upon conversations with third parties. Colten v. United States, 305 F.2d 639, 639 (2d Cir. 1962); United States v. United States Shoe Machinery Corp., Sunkwa, 89 F. Supp. at 359; General Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 85-86 (E.D. Pa. 1969). Thus, that portion of the magistrate's ruling which ordered Foley to testify as to those matters which Feldman learned from third parties and reported back to him is adopted in full. However, Arthur Young can also question Foley regarding the substance of any comments or advice Feldman may have given Foley in the course of these discussions because these communications are not based upon the confidential communication of the client.

It should also be noted that the privilege pertains solely to the substance of communications. It does not preclude inquiry into the subject matter of the communications. See generally Fed. R. Evid. 510, Advisory Committee's Note. Therefore, Foley cannot refuse to answer questions of the nature represented by Group II.

It is also clear that, where the attorney acts as a negotiator or business agent for his client, the confidential communications between them are not privileged. Wiley, Comptroller, Inc. v. U.S., 262 F.2d 809, 812 (2d Cir. 1959); General Information Confidential, S.A., v. Dresser Industries, Inc., 19 F.R.D. 513, 514 (S.D.N.Y. 1956). For that reason, it is permissible to question either the client or the attorney regarding the general

Memorandum Opinion

nature of the attorney's services to his client, the scope of his authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third parties. Celton v. United States, supra, 305 F.2d at 633, 638; United States, v. Tolson, 255 F.2d 441 (2d Cir. 1958).

The transcript of Foley's testimony at the deposition in question sheds little light upon the issue of whether Feldman was acting as an attorney or as business agent during the negotiations preceding conclusion of the April 1970 agreements. At one point, Foley was asked:

"[Attorney for Arthur Young] Q. Did he [Feldman] or you [Foley] play the lawyer part in the negotiation which led to the meeting of the minds as to the substance of the agreements?"

"[Foley] A. That would be difficult to say, very difficult to say.

"Q. Who shared it?

"A. We shared it. But I had the -- obviously had the veto function because I was the person putting up the securities. He was my counsel." Tr. at 113.2/ (Emphasis supplied.)

At yet another point during the deposition, Foley stated:

"Mr. Feldman can give you a far better answer to this question than I can because his is more -- he is more conversant with the law, he is more conversant with much of the information with respect to this case and he negotiated the deal with the people at Bling on my behalf." Tr. at 261. (Emphasis supplied.)

Foley not only gave contradictory testimony, but he also invoked the privilege in response to threshold questions such as those contained in Group I which might have aided the

Memorandum Opinion

Court in determining the exact nature of Feldman's services and the scope of Feldman's authority. Moreover, his responses, as exemplified by the portions of his testimony set forth supra, were conclusory rather than descriptive.

The Court appreciates the magistrate's difficulties in determining the proper disposition of this matter. However, the magistrate's approach would permit Foley to invoke the privilege merely by answering that he obtained "legal", rather than "business", advice from Feldman. The more appropriate remedy at this stage of the proceedings is to depose Foley again in order to determine the exact nature of the services Feldman rendered and the scope of Feldman's authority during negotiations. Of course, Foley need not reveal the substance of any confidential communications at this stage. However, before he can be permitted to invoke the privilege as to the substance of confidential communications, he must first reveal specific facts which would tend to establish that the Foley-Feldman relationship was one of attorney and client. Such conclusory answers as "He was my counsel" or "he negotiated the deal" are not sufficient. In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965). If, after the additional deposition of Foley, the Court determines that Feldman's services were of a business nature, Foley will be ordered to testify as to the substance of any confidential communications he and Feldman may have had. If, on the other hand, it becomes clear that Feldman's services were of

Memorandum Opinion

a legal nature, the Court will then consider whether Foley has waived the privilege.

Accordingly, Foley is directed to make himself available for further deposition by Arthur Young within thirty (30) days of the filing of this opinion. Arthur Young is instructed to question him regarding the specific nature of Feldman's services and the scope of Feldman's authority during the course of negotiations with Blain. Foley may also be questioned as to whether he consulted with Feldman regarding specific documents and agreements. (Foley need not divulge the substance of these communications.) Finally, Arthur Young may question Foley regarding information which Feldman learned from third parties and subsequently communicated to him and communications, in the form of advice or comments, which Feldman may have made to Foley in reference to the information Feldman obtained from third parties. Within ten (10) days of the completion of Foley's deposition, Arthur Young is instructed to renew the instant motion. At that time, the Court shall reconsider whether Foley can properly invoke the attorney-client privilege with respect to those types of questions not covered by the instant order.

So ordered.

Dated: New York, New York
January 16, 1974

U.S.D.J.

Memorandum Opinion

J. P. FOLEY & CO., INC., et al.,
Plaintiffs,
-against-
OLIVER D. VANDERBILT, et al.,
Defendants.

70 Civ. 4194

FOOTNOTES

- 1/ Plaintiffs argue that the scope of the attorney-client privilege is governed by the law of New York. See Baird v. Korman, 279 F.2d 623 (9th Cir. 1960). The Court is persuaded, however, that, because jurisdiction in this case is predicated upon the federal securities laws, federal law controls. See Gomber v. Wolfishberger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971); Colton v. United States, 300 F.2d 633 (2d Cir. 1962); Fed. R. Evid. 501, Advisory Committee's Note.
- 2/ "Tr." refers to the transcript of Foley's deposition.

Exhibit 3 Annexed to Affidavit of Jeffrey A. Barist

Letter from Mr. Milberg to Judge Tenney
 Dated March 6, 1974

MILBERG & WEISS
 COUNSELLORS AT LAW
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LAWRENCE MILBERG
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CABLE ADDRESS
 LAMIWLAW

MARTIN A. FROMER
 LEONARD FELDMAN
 COUNSEL

March 6, 1974

Honorable Charles H. Tenney
 United States District Judge
 United States Courthouse
 Foley Square
 New York, N.Y. 10007

Re: Foley v. Vanderbilt, et al.
70 Civ. 4194 CHT

Dear Judge Tenney:

We have agreed with Mr. Barist of White & Case, that the claim of attorney-client privilege in this case will be withdrawn and we therefore advise your Honor that the motion to compel plaintiff's answers is moot.

Respectfully,

LAWRENCE MILBERG

LM:lr

cc: Messrs. White & Case
 Milgrim Thomajan & Jacobs
 Fried Frank Harris Shriver & Jacobson
 Cadwalader, Wickersham & Taft

**Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts**

(All deposition pages annexed to the original affidavit are reproduced here. However, they have been rearranged sequentially by deposition.)

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Foley

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1 the agreements which we have previously marked as
2 Exhibits 2 through 7, is that correct?

3 A That's correct, sir.

4 Q You were represented by Mr. Feldman--

5 A That's right.

6 Q --throughout this period?

7 A That is right.

8 Q You had known Mr. Feldman before this?

9 A That is right.

10 Q You chose him as counsel of your own choosing?

11 A That's right, sir.

12 Q In the course of these negotiations, sir, could
13 you tell us who at Blair & Company you met with?

14 A Initially we met with Mr. Rush. He was the
15 first person we talked with.

16 A And then later he brought in Mr. Richardson,
17 and Mr. Vanderbilt.

18 A And then a little later Dr. Heberle. That's
19 H-e-b-e-r-l-e, I believe. Is that right?

20 A MR. FELDMAN: I wouldn't know.

21 A THE WITNESS: I believe that's right.

22 A Mr. Ramsey, I met him but he took very
23 little part in the actual negotiations with me.

24 A Q Anyone else, sir?

1 Foley

2 Q To use your phrase, when was there a meeting
3 of minds as to the substance of the agreement?

4 A As defined in terms -- as I have defined it
5 here?

6 Q That is right.

7 A I would guess sometime in March.

8 Q Did Mr. Feldman participate in the negotia-
9 tion which led to the meeting of minds as to the
10 substance of the agreement?

11 A Which led to the meeting -- yes, he parti-
12 cipated, yes.

13 Q Did you authorize him to negotiate for you
14 on your behalf?

15 A One hundred percent, yes.

16 Q Did he or you play the larger part in the
17 negotiation which led to the meetings of the minds as
18 to the substance of the agreements?

19 A That would be difficult to say, very difficult
20 to say.

21 Q You shared it?

22 Q We shared it. But I had the -- obviously
23 had the veto function because I was the person putting
24 up the securities. He was my counsel.

25 Q Sir, during the course of these negotiations,

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Foley

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16 A I used the words "ostensibly" as synonymous
1 with "presumably."

6 Q Did you have a meeting with representatives
1 of Blair & Co. on the morning of April 3, 1970?

6 A Not that I recall.

7 Q This is the day on which you signed these
3 agreements.

9 A Not that I recall, Mr. Barist.

9 Q Prior to the closing which you previously
1 testified to, did you --

12 A It took place in the afternoon.

13 Q Yes, it took place in the afternoon.

14 A Right.

15 Q Did you have a separate meeting with repre-
16 sentatives of Blair & Co.?

17 A Not that I recall.

18 MR. BARIST: Would you mark as Exhibit
19 26A, a document containing 21 pages, on the letter-
20 head of Arthur Young & Co., report of certified
21 public accountants, and indicating on page three
22 that it is part 1.

23 MR. FELDMAN: What is the date of it?

24 MR. BARIST: The covering letter is
25 dated December 5, 1969.

Foley

(Document dated December 5, 1969, containing 21 pages, on Arthur Young & Co. letterhead, marked Defendant Arthur Young Exhibit 26A for identification, as of this date.)

MR. BARIST: Could you mark as Exhibit 26B a document whose first page consists of the letterhead of Arthur Young & Co., report of certified public accountants dated December 5, 1969, consisting of 45 pages.

Both documents were transmitted to me by plaintiffs' counsel in response to my notice to produce and bear in their upper right-hand corners the number 9 written in black ink, which was on the documents when I received them. The numbers in pencil are put on by my office and are not claimed.

(Document, first page on Arthur Young & Co. letterhead, dated December 5, 1969 and consisting of 45 pages, marked Defendant Arthur Young Exhibit 26B for identification, this date.)

Q Sir, I ask you to look at Exhibits 26A and 26B for identification and take your time and look at them and would you tell me, sir, have you ever seen those documents before?

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Foley

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18 2 When I say "these documents," I mean or
3 copies of these documents.

4 A Yes, I understand.

5 I don't know --

6 MR. FELDMAN: The difficulty I have
7 with this, Mr. Barist, is an interesting one. Both
8 documents which you say came from my office, when
9 they were Xeroxed to you had only one staple
10 through them. These have obviously been separated,
11 and apparently for some purpose and then put
12 together again.

13 MR. BARIST: No, sir. Any additional
14 staples were put through simply for security
15 purposes.

16 MR. FELDMAN: Can you explain these
17 staple holes to me?

18 MR. BARIST: Yes, staples which did
19 not take at first and were taken out and -- I
20 said for security purposes only.

21 MR. FELDMAN: The only thing I am
22 concerned about is the accuracy of the document.
23 We can use it by all means, but I would like an
24 opportunity to compare it.

25 MR. BARIST: Certainly.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Foley

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3 THE WITNESS: I don't recall having seen
4 these specific documents, Mr. Barist, although I
5 recall at some time I saw similar documents, but
6 whether it was these, frankly, I do not know.

7 Q Could I ask you what you mean by "similar
8 documents"?

9 A Well, they were large -- they were reports
10 of Arthur Young. I do not recall the dates or the specific
11 contents of the ones I saw. They were large reports,
many pages.

12 Q You received previously, sir, large reports
13 of Arthur Young, large financial reports?

14 A Which I turned over to my counsel. And if
15 his -- I would testify for the record that if his check
16 or comparison of his file documents with these indicate
17 identity in content, then these are the ones that I
18 did see in the past. Okay?

19 Q Fine.

20 Could I ask you, sir, when you did see
21 these documents?

22 A I don't recall the -- I can place it -- I
23 recall the -- how I happened to get them. Therefore I
24 can give you some general idea of time.

25 Q Could you do that, sir?

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Foley

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2 A Somebody sent them to me from California.

3 One of the subordinated holders sent them to me from
4 California, as I recall. And they sent them to me
5 following -- and I do not recall how long following --
6 the meeting we held in the hotel in New York.

7 Q When you say "meeting," you mean meeting
8 of subordinated lenders?

9 A That is right, sir, that I had called on my
10 own volition.

11 Q When did that meeting take place, sir?

12 A I believe it was in September, sometime in
13 September.

14 Q September, 1970?

15 A That is right.

16 Q Were these documents which you testified to
17 as having been received by another subordinated lender
18 in California solicited by you or did they come in the
19 mail unsolicited?

20 A The latter.

21 Q Do you remember his name?

22 A I do not recall who sent them to me.

23 Q Did it have a covering letter?

24 A I do not recall.

25 Q Did he identify himself in some way?

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Foley

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2 A He must have, when he sent them. But I had
3 a lot of contact with many of these people in person at
4 the meeting and some by telephone

5 Q Do you know what those documents are
6 called, 26A and B?

7 MR. FELDMAN: You mean the title
8 on them?

9 Q Do you know if there is a particular technical
10 name for these things?

11 A I wouldn't say that I know, no.

12 Q Have you ever heard the phrase "Answers to
13 financial questionnaire"?

14 A I've heard that, yes. I've heard that.

15 Q At any time during your negotiations with
16 Blair & Co., did you ask Blair & Co. for their answers
17 to financial questionnaire?

18 A I do not recall ever having asked that
19 question.

20 Q Do you know if Blair's answers to financial
21 questionnaire were ever discussed during the negotiations?

22 A Not to my best knowledge.

23 Q Did you receive similar documents to these
24 during your negotiations with Blair?

25 A No. The first time I saw them was when they

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Foley

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2 were sent to me following that hotel meeting.

3 Q Did you instruct your attorney in September
4 of 1970 to secure copies of answers to financial ques-
5 tionnaire from Blair?

6 A I don't recall --

7 MR. FELDMAN: Just a minute.

8 THE WITNESS: I gave him --

9 MR. FELDMAN: Just a minute.

10 THE WITNESS: Sorry.

11 MR. FELDMAN: Can I have the question
12 read?

13 (Question was read.)

14 MR. FELDMAN: Don't answer the question.

15 MR. BARIST: Mr. Feldman, I don't
16 intend to invade your privilege.

17 MR. FELDMAN: Then if you don't, don't
18 ask the question.

19 MR. BARIST: Could you tell me what
20 you find wrong with it?

21 MR. FELDMAN: Anything that he said
22 to me, whether you describe it as what did he say
23 or whether you describe it or did you give him an
24 instruction to do something, is an invasion of the
privilege. It is a communication between the

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Foley

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2 attorney and the client.

3 MR. BARIST: In that case, we have a
4 different understanding of the privilege which
5 will obviously have to be resolved in court.6 MR. FELDMAN: That may very well be,
7 but I don't propose to debate it now.8 MR. BARIST: Would you mark as
9 Defendant's Exhibit 27 a letter on the stationery
10 of Blair & Co., Inc., dated September 10, 1970,
11 bearing the signature John P. Richardson, addressed
12 to Leonard Feldman, Esq.13 (Letter on Blair & Co., Inc.
14 stationery, dated September
15 10, 1970, signed John P.
16 Richardson to Leonard Feldman,
17 Esq., marked Arthur Young
18 Defendant Exhibit 27 for iden-
19 tification, this date.)20 Q Mr. Foley, could you look at Defendant's
21 Exhibit Arthur Young 27 and I ask you this, sir, if you
22 recognize Mr. Richardson's signature on that document?

23 MR. FELDMAN: Do you know his signature?

24 THE WITNESS: I don't know his signature.

25 Q I ask you, sir, if you know whether a document
corresponding to the letter marked 27 was annexed to the
affidavit of Mr. Feldman as an exhibit in a bankruptcy
proceeding?

Foley

(Three page document headed "Blair & Company, Inc. Certificate Of Amendment Of Certificate Of Incorporation," marked Defendant Arthur Young Exhibit 38 for identification as of this date.)

Q I show you Exhibit 38, sir, and I ask you, sir, if this document was executed by Blair as part of the transactions involved in the pledging of your securities.

A I don't know, Mr. Barist.

Q Have you ever seen Exhibit 38 before?

A Not that I recall.

Q Have you ever had any discussions with anyone in regard to the necessity for Blair to amend its certificate of incorporation to grant you the options on Blair stock reflected in Exhibit 3?

A I don't recall ever having any such discussions. It's conceivable Mr. Feldman did, but I don't recall having participated, if there were such discussions.

Q Did Mr. Feldman report back to you on discussions which he had with Blair at which you were not present?

A In some instances, yes, and in some instances, I would assume he did not. I don't recall that he gave me a blow by blow transaction -- account of what happened in each of his discussions. In fact, I'm sure he didn't.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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Foley

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I couldn't even tell you how many meetings he had or when they occurred specifically.

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(CONTINUED ON PAGE 387.)

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Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Holey

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Q In what instances would Mr. Feldman not report back to you?

A I can't answer that question. That would -- to be able to answer that question would be able to exhaust a negative universe and I can't do that, nor can anyone else.

Q In what instances would he report back to you?

MR. BERSHAD: I think we are beginning to invade the privilege, unless you can in some way phrase your question better.

Q You seem to indicate that there was a dividing line as to whether Mr. Feldman would report back to you or not?

A No, I didn't make that distinction. I simply said that in a number of meetings that he had -- I assume he had -- he -- we had no subsequent discussions about them. In other instances we might discuss. It would all depend on whether he felt there was a need to confer with me in respect to getting my permission, that's all.

Q Did you give your attorney, Mr. Feldman, any instructions as to under what circumstances he should report back to you as to the meetings he held with Blair

1 Foley

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j2 2 MR. BERSHAD: This is an invasion of
3 the privilege.

4 MR. BARIST: I disagree. We'll claim
5 that question.

6 MR. BERSHAD: Don't answer the
7 question.

8 BY MR. BARIST:

9 Q Are you refusing to answer that question
10 on the advice of counsel?

11 A Yes, sir.

12 Q During this deposition, sir, when in the
13 past counsel has directed you not to answer, you have
14 declined to answer these questions on the advice of
15 counsel, sir?

16 A That's right.

17 Q Do you know, sir, if the Blair amendment of
18 the certificate of incorporation, Exhibit 38, was reviewed
19 by your counsel, drafts of that?

20 A I don't know.

21 Q Do you know if your counsel required it as a
22 condition to the closing?

23 A I don't know.

24 Q Do you know, sir, if it was necessary for
25 Blair & Co. to receive consents from Blair's shareholders

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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Foley

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2 Mr. Feldman at the time you went into the transaction?

3 A I would say we hadn't worked that out
4 yet, Mr. Barist.

5 Q Did you ever have discussions with him?

6 A Pardon?

7 Q Did you ever have discussions with him
8 on that regard?

9 A Again, that would be a very difficult
10 question to answer, in all honesty. I'm sure he knew
11 that I was good for it. If he had a bill he submitted
12 to me, I'm sure he knew that I would pay it and
13 wouldn't question the bill.

14 Q Had he submitted a bill to you?

15 A I testified that he had not submitted a
16 bill, that's right, sir.

17 Q How was he to be compensated for the
18 Hayden, Stone transaction?

19 A He was paid by Hayden, Stone, that's my
20 understanding.

21 Q I am going to state for the record--

22 A Come, where is your imagination, Mr.
23 Barist?

24 MR. BARIST: I am going to state
25 for the record, I am confused, and it really

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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Foley

1115

2 A That is right, sir.

3 Q Has Milberg & Weiss billed you for their
4 services?

5 A Not yet, no, sir.

6 Q Do you have any understanding as to whether
7 or not Mr. Feldman's services rendered to you in
8 regard to the Blair transaction are to be included in
9 any bill sent to you by Milberg & Weiss?

10 A I have no -- I have no knowledge of this.

11 Q You have had no discussions along this line?

12 A That is right, sir.

13 MAGISTRATE GOETTEL: Let's go
14 off the record just a second.

15 (Discussion off the record.)

16 MAGISTRATE GOETTEL: Back on
17 the record.

18 Q You did expect to pay Mr. Feldman for his
19 services in regard to the Blair transaction; is that
20 correct?

21 A Yes.

22 Q Did you expect to pay him in money?

23 A Yes, sir.

24 Q Was there any other form of compensation?

25 A Not in love, Mr. Barist.

*Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts*

Feldman

9

? || of New York, sir?

A Yes, sir.

Q When did you become a member of the Bar?

5 || A 1943.

6 Q As of the year 1970, were you associated
7 in the practice of law in this state with any firm?

8 A No.

9 You were a single practitioner?

A No.

Q Were you a partner in any firm?

A No

8 Were you practicing law in this state?

A Yes, sir. I was.

15 Q What was the name of the office in which you
16 were practicing?

17 A Well, I have an office at Two Pennsylvania Plaza.

Q No, I am asking, as of 1970, sir.

A That's what I'm answering you.

21 Q You had, as of 1970, an office at Two
Pennsylvania Plaza?

" A Right

Q. Were you of counsel to any firm in that year?

A Yes sin

*Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts*

Feldman

1
2 Q What firm was that?
3 A Milberg & Weiss.
4 Q Was it called Milberg & Weiss in 1970?
5 A No.
6 Q What was the name in 1970?
7 A Leibowitz, Milberg, Weiss & Fox.
8 Q Is Leibowitz, Milberg, Weiss & Fox a
9 predecessor to the firm of Milberg & Weiss?
10 A Yes, sir, I should imagine so.
11 Q Are you presently of counsel to Milber
12 Weiss?
13 A Yes, sir.
14 Q When did you first meet Dr. John P. Fo
15 A I have no recollection of the year.
16 Q Would it have been prior to 1970?
17 A Yes, sir.
18 Q Approximately how many years prior
19 thereto?
20 A I don't propose to speculate.
21 Q Would it have been less than five yea
22 before?
23 A I don't believe so.
24 Q Would it have been less than three y
25 before?

1 38 Feldman

2 Q Prior to April 3, 1970, did you consult with
3 Mr. Milberg or anyone else at the firm to which you were
4 of counsel in regard to SEC rules or New York Stock
5 Exchange rules in regard to the Foley transaction?

6 A If I did I would regard that matter as
7 privileged on behalf of my client. Mr. Milberg is
8 also Dr. Foley's principal attorney in this matter.

9 Q I am talking about matters prior to April
10 3, 1970.

11 A That is what I am talking about.

12 Q Was Milberg Mr. Foley's attorney prior to
13 April 3, 1970?

14 A No.

15 Q Did Mr. Milberg represent anyone in regard
16 to the Foley transaction with Blair prior to April 3,
17 1970?

18 A No.

19 Q Prior to April 3, 1970, did you consult with
20 any accountant in regard to the Foley transaction with
21 Blair?

22 A No.

23 Q Did you consult with any investment adviser?

24 A No.

25 Q Did you consult with anyone in regard to the

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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27m 2 New York Stock Exchange in the period prior to April, 1970?

3 A The only requirement -- the only inquiry I
4 made was a general inquiry of Mr. Richardson whether or not
5 there was any other documents that he thought I should see
6 and his answer was no.

7 Q When did you make this inquiry?

8 A During the course of discussion.

9 Q On what date?

10 A I have no particular date.

11 The discussion came up on the question of the
12 warranties by Blair.

13 Q What warranties were these?

14 A Well, the conditions contained in the agree-
15 ment was a representation by Blair right at the very
16 beginning, they would warrant their full compliance with
17 the SEC and the Stock Exchange. That was incorporated in
18 the agreement, and -- and this was the context within
19 which my inquiry was made of Richardson when I asked him
20 whether there was anything that I had to see, any other
21 documents that he thought I should see and his answer was
22 no.

23 Q As of the time you made this inquiry to Mr.
Richardson, do you remember what documents you had seen?

24 A Nothing.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1

Feldman

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30m 2 Q Did you ask any of these representatives of
3 Blair & Company to furnish you with that document?

4 A The only conversation I had with regard to
5 documents other than those already discussed was the
6 inquiry which I made of Mr. Richardson which I recounted
7 to you and his response which I told you.

8 Q I still would like an answer to my question
9 as to whether or not you asked anyone at Blair to furnish
10 you or to show you the Schwabacher answers to Financial
11 Questionnaire at June 27, 1969, referred to in the fourth
12 paragraph on Exhibit 16.

13 MR. BERSHAD: I think that has
14 been answered.

15 MR. BARIST: I would like to get
16 a yes or no answer to that.

17 A I don't think the question is capable of an
18 answer.

19 If by asking Mr. Richardson whether there
20 were any other documents, I -- there were such documents
21 and he answered to me no, then obviously I asked for the
22 document and his answer was false.

23 Q Did you ever ask for that document specifically
24 by name?

A I asked for any document regardless of how

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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31m 2 described.

3 Q In this inquiry to Mr. Richardson?

4 A Yes.

5 Q Did you regard that question as encompassing
6 the Blair answers to Financial Questionnaire at 9/26/69?

7 A I had no particular document in mind.

8 I wanted any and every document that Mr.

9 Richardson could in honesty as a member of the bar
10 represent as being pertinent to the situation that I
11 should have. His answer was that there were no such
12 documents and I relied on his answer.

13 Q At any time, sir, did you ask Blair for a
14 specific document, the representatives of Blair you dealt
15 with, for a specific document by name and was told in
16 words or substance that they would not furnish that
17 document to you?

18 A Mr. Barist, Blair never refused or agreed to
19 furnish me with any document other than the documents
20 already described.

21 The situation was a very simple one. They
22 were asked specifically whether or not there was any
23 document which we should have concerning information about
24 Blair. We were told no. And they were asked to subscribe
to a warranty which covered the entire situation.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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32m 2 Q The warranty being the Rule 325 compliance
3 warranty?

4 A No, the warranty being that there was no
5 investigation, that there was no proceeding, that there
6 was nothing pending against them, and that they would be
7 in full compliance with every regulation and every rule
8 of every agency concerned, including the Stock Exchange.

9 Q This was your understanding of the warranty,
10 sir?

11 A This was my understanding of the warranty.

12 Q The request that they furnish you with all
13 pertinent documents to this warranty --

14 A No, no, Mr. Barist, you are misstating.

15 MR. BERSHAD: I don't think a
16 request like that was made.

17 Q If I misunderstood your testimony, sir, I
18 apologize.

19 A The testimony is very simple. They were
20 asked to warrant unconditionally their compliance with
21 every statute and every regulation and every requirement
22 of any governmental agency or of the Stock Exchange, or
23 any Exchange for that matter.

24 Q Did you ask Mr. Richardson --

A There was only one qualification to the

*Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts*

Feldman

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33m 2 change in the warranty, and that was on the question to
3 the fact that they had disclosed to us during the period
4 of time that they were dealing with us that they were not
5 in compliance with the net capital rule of the Exchange.
6 It would have been unreasonable for you to ask them to
7 warrant that which they had disclosed to us.

8 Q Did you ask Mr. Richardson if there were any
9 other documents pertinent to this warranty which you
10 should have?

11 A No. I asked Mr. Richardson what I described
12 to you I asked him, namely, whether or not there were any
13 documents which he thought I should have and his answer
14 was no.

15 Q Who else was present when you asked Mr.
Richardson this question and received that answer?
16

17 A Either Mr. Segal or no one, because we spoke
18 usually in meetings which were attended by either Segal
19 or Richardson.

20 Q Did you report your discussion with Mr.
Richardson which you have just testified to to Mr. Foley?

22 MR. BERSHAD: I think we may have
the privilege there.

24 Q Are you claiming privilege to that?
A Yes

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Feldman

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2 have taken place in July. Other than that, this was my
3 first awareness of a filing by Arthur Young.

4 Q Were you aware before this meeting that there
5 was a document entitled "Answers to Financial Question-
6 naire?"

7 A We discussed that yesterday.

8 Q Your answer, sir? Were you aware?

9 A The answer is the same as it was yesterday
10 in response to the same question.

11 Q I show you Exhibit 26 -- that includes all its
12 subparts on the Foley deposition -- and ask you when you
13 first saw this document or the document of which Exhibit 26
14 is a copy.

15 A My answer to the question concerning Exhibit 26
16 and its varying parts is the same as the answer that I
17 gave you in response to Exhibit 28.

18 Q That you received it in either August or
19 September?

20 A If those are the dates. It was either --
21 the July or August -- you see, I have to relate to when
22 John Foley received it, and that, of course, I do not know.

23 That would have been in either July or August.
24 And I asked it of John Richardson in September.

Q Do you know if prior to April 3, 1970, prior

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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1

2 to or on April 3, 1970, Mr. Foley received a copy of
3 Arthur Young's Answers to Financial Questionnaire, Report
4 on Answers to Financial Questionnaire for Blair & Company?

5 A I have no reason to believe that he did.

6 Q Prior to April 3, 1970, did you have any
7 discussions in regard to Blair & Company with anyone
8 other than either the Foley group or the representatives
9 of Blair?

10 A I'm afraid I don't understand.

11 Q You don't understand the question?

12 A I don't understand the question.

13 Q Did you have any discussions about Blair &
14 Company with somebody other than either the Foley group
15 or representatives of Blair? With third parties, in other
16 words.

17 A Well, other than the people in my office,
18 the answer would be none, but I recall none at this time.

19 Q By the people in your office, do you mean people
20 associated with the law firm of Milberg & Weiss?

21 A Yes.

22 Q Did you make any investigation to find out
23 whether the statements the Blair representatives made
24 about the condition of Blair was as was told to you by them?

A I'm afraid you'll have to be a little more

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Feldman

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2 Mr. Luce, nothing ever came to my attention that suggested
3 that he was not telling me the truth.

4 Q Prior to April 3rd, the closing, sir, did you
5 receive every document from Blair which you asked them to
6 furnish to you?

7 A Prior to April 3rd, I hadn't asked them to
8 furnish me anything. Documents were produced by both
9 sides as they were required by the discussions and
10 negotiations, but no specific document was demanded of
11 Blair, except in relation to the discussion that we had
12 yesterday when I asked Mr. Richardson whether there was
13 any document that he knew of that I should see and his
14 response was no.

15 If that falls into the category of a demand,
16 then obviously I did demand.

17 Q You testified yesterday, did you not, that
18 after the closing you had difficulty in getting from
19 Mr. Richardson all of the documents that were executed
20 during the closing?

21 A That's a subsequent period.

22 Q I realize that. I am asking you if you had
23 that same situation of difficulty getting documents which
24 were promised to you before the closing.

25 A No, we all worked on the same documents so

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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Feldman

1 opinions.

2 A Yes.

3 Q Do you know if the firm with which you are
4 of counsel, Milberg & Weiss, prior to April 3, 1970, had
5 been involved in any actions involving accountants as
6 defendants?

7 A I believe they have.

8 Q More than one?

9 A I don't know.

10 Q But they have been involved in some?

11 A I believe so.

12 Q Did you discuss Exhibit 16 with anyone at
13 Milberg & Weiss?14 A If I did, I wouldn't tell you, as I told you
15 yesterday.

16 Q You regard that as privileged?

17 A I regard that as activity privileged since
18 Milberg & Weiss is also the attorney for Dr. Foley.19 Q I am talking about the period prior to April
20 3, 1970. Prior to April 3, 1970, sir, you were the
21 attorney for Dr. Foley, is that correct?

22 A Yes.

23 Q Was Milberg & Weiss also the attorney for
24 Dr. Foley prior to April 3, 1970?

1 Feldman

2 A No.

3 Q Prior to April 3, 1970, did you discuss
4 Exhibit 16 with anyone at Milberg & Weiss?

5 A I would regard that as privileged.

6 Q For what reason, sir?

7 A The presence in the same office of lawyers
8 and employees in the course of matters which are handled
9 in that office by me remain privileged so that if Milberg
10 & Weiss had learned something concerning Dr. Foley even
11 if it never represented him they could not disclose it
12 under the canons.

13 Q You and Milberg & Weiss shares an office?

14 A I am counsel to Milberg & Weiss.

15 Q You have your office in the same office as
16 theirs?17 A Yes. My files are there, they are available
18 to anyone who comes in. If that privilege didn't extend,
19 it would be a disaster.20 Q For all practical purposes, it is the same
21 law firm? It is simply a different arrangement than that
22 of a partnership, is that correct?

23 A That is correct.

24 Q But you would make no claim of a difference
25 between your status with Milberg & Weiss being of counsel

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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Feldman

1 as compared to as if you were a partner of the firm?

2 A Oh, I would make a very real distinction.

3 Q In regard to the claim of the privilege?

4 A Not in regard to the claim of the privilege,
5 because that privilege would extend even to persons
6 employed by Milberg & Weiss who are not at all involved
7 with me.

8 Q That is correct. I understand that to be
9 your position. My comment that that is correct is not
10 meant to agree with you.

11 In what way would you make a distinction
12 to your being of counsel to Milberg & Weiss as opposed
13 to being a partner of Milberg & Weiss?

14 MR. BERSHAD: I don't think this is
15 getting into anything relevant.

16 A You are far afield.

17 MR. BERSHAD: If you want to prepare
18 a memorandum of law and go before the magistrate,
19 I guess you can.

20 Q Prior to the institution of the arbitration
21 proceeding which I understand you to claim to be the
22 cutoff point in terms of when work product begins--is
23 that correct?

24 A No, the work product began before.

25

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Feldman

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2 thereof is a figure of \$14,421,550 which is said to be
3 the amount obtained by multiplying the number of shares
4 of common stock of CMC by \$25.

5 A Yes, that's what it says.

6 Q That figure does not appear in Exhibit 1222
7 which is a draft of the same agreement dated 3/22/70.

8 Did you have any discussion with representa-
9 tives of Blair or CMC with regard to the number of shares
10 of CMC common stock which were then outstanding. That
11 same paragraph appears on the bottom of Page 2 on Exhibit
12 1222.

13 A Your question was did I have any conversation?

14 Q Discussions with representatives of Blair
15 with regard to the number of shares of CMC common stock
16 which might be outstanding. That is with representatives
17 of Blair or CMC.

18 A The discussions that I had were with Mr. Segal
19 and Mr. Richardson who acted in both capacities as far as
20 I was concerned.

21 And the answer is yes, we had discussions.

22 Q Do you recall the content of any such
23 discussions?

24 A No.

25 Q Were you shown any documents which might

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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1 evidence the number of shares of CMC common stock then
2 outstanding?

3 C A I was told what the number was.

4 D Q Were you shown any documents to evidence that
5 fact?

6 A I don't recall whether I was or I wasn't.

7 Q Did you ask to see any documents which might
8 evidence that fact?

9 A I have to answer that in two ways.

10 One, I asked Mr. Richardson to show me any
11 and all documents that he deemed pertinent and necessary
12 for me to see. Whether he showed me any document or he
13 showed me how many shares were outstanding, I don't know.
14 I don't recall if there was a CMC balance sheet around
15 which showed so many shares of stock issued or whether
16 he said he would find out and get it for me.

17 O Mr. Richardson was not at all as conversant
18 with the affairs of CMC as he was with the affairs of
19 Blair. So how that number came to us for use in these
20 agreements, I don't know.

21 If somebody said we checked with CMC and
22 they told us this is the number we have outstanding, I
23 have no way of knowing at this time.

24 Q I believe you said you asked to see all papers

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Feldman

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2 A Things that I had read, heard and discussed.

3 Q Did you request from Blair, from any

4 representative of Blair, any report of such nature?

5 A Of what nature?

6 Q Report which you had the impression it was
7 required to be submitted either to the New York Stock
8 Exchange or to the SEC or to another regulatory agency.9 A I requested of Mr. Richardson that he gave
10 me any other document that he thought I needed, and asked
11 him if there were such, and he said that there weren't,
12 and that was it.

13 Q You specified no specific document?

14 A I did not know what to specify. I had to
15 rely on Mr. Richardson to supply me with whatever he
16 thought I required in order to do the work that I was
17 called on to do.18 Q Did you request of any third party any report
19 which you were under the impression might have been sub-
20 mitted to a regulatory agency?21 A I had no impressions about it. I did not
22 know what was submitted. I did not know what was in
23 existence.

24 I asked Mr. Richardson what I told you I

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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1 given and that was the state of the matter.

2
3 MR. BERSHAD: I think it was
4 covered in the prior depositions. There
5 is some reference here on Page 322 to the
6 same kind of thing where you asked what
7 was asked of Mr. Richardson and the
8 financial statements and Exhibit 16, and
9 I think we're just going over the same area.

10 MR. GROPPER: But I believe Mr.
11 Feldman said here today that he was under
12 the impression that some report was required
13 to be submitted to some regulatory agency.

14 THE WITNESS: No, no, no, you
15 misunderstood what I said.

16 I said the last time we were
17 together, before this session -- whether it
18 was at our first session or at our second
19 session -- I have always been under the
20 impression that member firms were under
21 the jurisdiction of the New York Stock
22 Exchange and were also supervised by the
23 SEC and that both organizations had the
24 authority that required that reports be
25 rendered to them, period. Nothing has

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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1 Did you ask him whose loans they were?

2 A No.

3 Q Did you know whose loans they were?

4 A No.

5 Q Prior to April 3rd, did you receive a
6 schedule of subordinated borrowings?

7 A No.

8 Q Did you ask for one?

9 A Not that I recall, no.

10 Q Do you know now what loans had matured prior
11 to February 28th or were about to mature?

12 A No. I received a schedule subsequent, but
13 I have never analyzed it to find out which loans were
14 being referred to.

15 Q Do you know whether or not that \$2,104,000
16 number refers to a subordinated loan of Mr. Ireland's?

17 A I have subsequently learned that it might
18 in part refer to him.

19 Q Do you know whether to the extent that it
20 might refer to one of his subordinated loans that that
21 loan was, in fact, withdrawn?

22 A Well, there were two -- I have since learned
23 that there were two Ireland loans. Which was the sub-
24 ordinated loan -- whether either was subordinated or what

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Feldman

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2 Q Did you point out anything to him about it?

3 A No. I don't recall o doing.

4 I'm sorry? Jeff, did you say something?

5 Q No, just mumbling. It wasn't a question.

6 I mumbled something.

7 Could you turn to Exhibit 26?

8 A Yes. I'm sorry, I looked at 27?

9 MR. MILLER: That's 26.

10 Q 26 is the answers to financial questionnaire.

11 A I see. Then you have no --

12 Q Yes, we do. I may not know how to ask
13 questions, but the paraprofessionals know how to put
14 together exhibit books.

15 MR. BARIST: Off the record.

16 (Discussion off the record.)

17 Q You received this document sometime after
18 April 3rd; correct, sir?

19 A That's right.

20 Q After your receipt of this document, did
21 you discuss it with Dr. Foley?

22 MR. BARIST: Withdraw that.

23 Q Did you show it to Dr. Foley?

24 A No.

25 Q Had Dr. Foley previously seen a copy of it?

Feldman

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1 A He saw it before I received it.

2 Q You saw it in August of 1970?

3 A Yes, that's my recollection.

4 Q That would be the first time he saw it?

5 A As far as I know, yes.

6 Q Upon his receipt of this in approximately
7 August of 1970, did he say anything to you about this
8 document?

9 A Immediately when he received it?

10 Q Within a period of time of having received
11 it. After his receipt, did he say anything to you
12 about it?

13 A It's been the subject of constant dis-
14 cussion.

15 Q Within the immediate period following his
16 receipt of this document, did he say to you, in words
17 or substance, "Why didn't we have this document when
18 we were negotiating with Blair?"

19 A No.

20 Q Why don't you go back to Exhibit 2, if you
21 could, sir.

22 A Yes.

23 Q Could you turn to the section on withdrawal
24 rights?

1 A Yes. Yes, go ahead.

2 Q Have you read Mr. Richardson's testimony
3 as to the derivation of the numbers used in the with-
4 drawal rights paragraph of Exhibit 2?

5 A Yes.

6 Q Does Mr. Richardson --

7 A I don't recall that I read it. I think
8 I've heard it.

9 Q Did what you hear accord with your recol-
10 lection of how these numbers were derived?

11 A No.

12 Q In what ways do you remember it being
13 different?

14 A He made up the story.

15 Q In deriving the \$21,750,000, did Mr. Richardson
16 tell you that this was to reflect Blair losses of
17 approximately \$1,500,000 between September 26, 1969,
18 and December 31, 1969?

19 A I have no such recollection that he did.

20 Q In deriving the \$21,750,000 used in the
21 collateral agreement, did Mr. Richardson tell you that
22 this reflects a book value of Blair at December 31,
23 1969, of zero?

24 A No.

1 Q In deriving the \$21,750,000 used in Exhibit
2 2, did Mr. Richardson tell you that this reflected
3 expected recoveries of stock record differences of
4 approximately \$500,000?

5 A No.

6 Q In deriving the \$21,750,000 used in Exhibit
7 2, did Mr. Richardson tell you that this reflected ex-
8 pected losses in January and February 1970 of approxi-
9 mately \$1,000,000 per month?

10 A My answers may have misled you, Mr. Barist,
11 and I don't want to do that.

12 You are asking me very specific questions.
13 That is not what Mr. Richardson told me at all. So
14 that, you can go through a whole series of hypotheses,
15 and I would have to say no or yes. And it doesn't
16 adequately describe or fully describe what actually
17 occurred.

18 What actually occurred I've testified to --

19 Q Could you just answer the last question?

20 A What's that?

21 Q The last question was, -- let me ask the
22 question this way:

23 Did Mr. Richardson tell you that Blair's
24 estimated losses for January and February 1970 were

Feldman

approximately \$1,000,000 per month?

A Then let me answer you this way: What Mr. Richardson told me I have previously testified to.

4 Richardson: I don't think I specifically asked you that
5 question.
6

A You could ask me whether or not Mr. Richardson told me that the Dodgers lost on that day, in relation to the \$21,750,000, and it would make as much sense.

You have to take the questions in the context of what occurred. What occurred I testified to.

12 | Mr. Richardson testified the way he did. I don't pro-
13 | pose to debate, through you, what Mr. Richardson said.
14 |

14 Q Did Mr. Richardson tell you that the
15 \$2,104,920.25 figure used in the withdrawal rights was the
16 amount of a loan from Melville Ireland expected to be
17 withdrawn?
18

18 I think that, better than anything else,
19 illustrates what's wrong with your question, Mr.
20 Barist. The amount of the Ireland loan never was
21 \$2,000,000, it was always over \$4,000,000. So if Mr.
22 Richardson tells me now that this is an Ireland loan of
23 two million, and he told me that, that we were to accept
24 what Mr. Richardson is saying, that he was lying then.

1 Q I just want to know whether he told you
2 that specific thing. Either he did or he didn't.

3 A No. He told me the two million dollars
4 represented his estimate of what would be withdrawn
5 shortly, or could be withdrawn, and therefore not
6 properly included in the formula. That's how it came
7 back. And how he computed it, he didn't bother to
8 enlighten me.

9 Q Did you have any discussions with Dr. Foley
10 as to the way in which these numbers -- let's start
11 off with the \$21,750,000 -- was derived for purposes
12 of the withdrawal rights provision?

13 A Yes.

14 Q What did you tell Dr. Foley?

15 A I told Dr. Foley that these were the figures
16 that were supplied to me by Mr. Richardson and Mr.
17 Siegel, and told him exactly what the two million repre-
18 sented, any potential withdrawals they felt should be
19 made and therefore not properly included, since it con-
20 templated, as I once tried to explain, no withdrawals,
21 and since they knew or anticipated, rather, that there
22 might be those withdrawals, we couldn't have them con-
23 sistently in there, and that's what I told him.

24 Q What about the \$21,750,000?

1 A I told him that was a figure that had been
2 supplied to us by Richardson and Siegel -- when I say
3 "and Siegel," as being the capital figure that we would
4 use for formula purposes, as being the one most closely
5 approximating actuality.
6

7 Q Did you make any investigation as to where
8 they got this \$21,750,000 figure from, what books and
9 records?
10

11 A No.
12

13 Q If the \$21,750,000 figure was wrong, either
14 purposely or unintentionally, or what have you, but
15 if it was wrong, if it understated or overstated Blair's
16 capital at 2/28/70, what would that then do to the
17 withdrawal rights in the formula?
18

19 A I don't understand your question at all.
20

21 A Doesn't the operation of the withdrawal
22 rights, as contemplated by the parties, as you have
23 explained them to us, depend on that original number,
24 \$21,750,000, being at least reasonably close to what
25 it says it is, that is, Blair's capital at 2/28?

26 A No, it wasn't Blair's capital. There never
27 was such a thing as Blair's capital. That was a word,
28 that the parties used for want of another word.
29

30 Q Maybe I am not expressing myself clearly.

Exhibit 4 Annexed to Affidavit of Jeffer A. Barist
Excerpts from Deposition Transcripts

Feldman

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1 suffer any loss for the pleasure of being a prospective
2 account, subordinated account.

3 So they made the suggestion to me, through
4 their counsel, and I mentioned it to Dr. Foley, and he
5 accepted the notion with alacrity, and decided that he
6 wanted to know no further about the matter. He asked
7 me if I would be satisfied with that, and I said I thought
8 so.

9 The question then arose as to how the fee
10 would be set, and I said I would accept Hayden, Stone's
11 counsel's evaluation, since I considered it a very
12 fair gesture. And much to my amazement, they were
13 far more generous than I ever expected them to be, and
14 that closed the matter, because I couldn't very well
15 justify any further charge to Dr. Foley.

16 Q Did you ever send Dr. Foley a bill for
17 the services rendered with respect to the Blair trans-
18 action? Did you ever bill him with respect to the
19 Blair transaction?

20 A No, not -- it never got off the ground, to
21 the point where I would have billed him, before the
22 damn thing exploded. And I felt it would have been in
23 very bad taste to have billed him for that at that
24 point.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Richardson 84

2 or short securities were discussed, other than that
3 adjustment of approximately one half million dollars
4 that you previously testified to?

5 A No.

6 Q Do you recall any discussion during any of
7 those meetings at which time fails to deliver or fails
8 to receive were discussed?

9 A No.

10 Q Do you recall any discussion, during any of
11 those meetings, at which time the profits or losses of
12 the company were discussed?

13 A For what period?

14 Q With respect to periods up to the time of the
15 meetings, as opposed to formula periods thereafter?

16 A Yes. There were discussions about profits and
17 losses up through the month of January.

18 Q Now, what were those discussions?

19 A To get from Mr. Rush the best in-house figures he
20 had for the months of October, November, December,
21 January and February.

22 To the best of my recollection, the indica-
23 tions were that the total P and L losses between Septem-
24 ber 26, 1969 and December 31, 1969 were approximately
25 one and a half million; that estimated losses for the

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Richardson

85

2 months of January and February 1970 were approximately
3 one million dollars for each month.

4 Q At which meeting do you recall that being
5 discussed?

6 A Well, it was discussed at one or more meetings in
7 which we were formulating the withdrawal provision and
8 arriving at the original capital figure.

9 Q Do you recall making any notes of those
10 discussions?

11 A We were making computations on tabs and figures
12 were--the results of our computations were being worked
13 into the formula. I do not recall making any notes of
14 the conversations. The results were set forth in the
15 agreement as actually signed.

16 Q Let us go into this business about the amounts
17 that went into the formula. What did you call it,
18 "Original Capital"?

19 A Yes.

20 Q What does original capital mean?

21 A For purposes of this agreement, it meant, as best
22 I recall--it is the total of subordinated capital, subor-
23 dinated liabilities of Blair at February 28, 1970, reduced
24 by losses in the period from September 26, 1969 through
25 February 28, on an estimated basis, and adjusted for

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1 Richardson 222

2 A Well, there were estimated figures. Certain of
3 the figures were estimated which the elements making up
4 the total original capital figure had to be estimated.

5 Q The estimates were the losses between
6 September or in January or February of 1970?

7 MR. MILBERG: Object to the form of that
8 question.

9 Q Were the estimates you just referred to
10 referring to the estimates for losses in January and
11 February 1970?

12 A Those two monthly results of operations were two
13 of the estimates that were used.

14 Q This was told to Mr. Feldman?

15 A Yes.

16 Q The other estimates that were used were
17 the estimates for losses between September 26, 1969
18 and December 31, 1969?

19 A Yes. There were some in house figures, I believe,
20 for those months. This was still considered to be in
21 the estimate stage. They were unaudited.

22 Q These are the figures of approximately
23 one and a half million dollars which you previously
24 have testified to?

25 A A million and a half to two million, I believe.

1

Richardson

223

2 I think a million and a half is the figure I remember
3 most distinctly.

4 Q In agreeing to this figure of \$21,750,000
5 with Mr. Feldman did you come with Mr. Feldman to an
6 agreement as to what you would regard the book value
7 of Blair at December 31, 1969 to be?

8 A Yes. I think we made the adjustment both up
9 and down. The figures that were subject to adjustment.
10 The results of an operation is for October, November,
11 December, available write-up certain assets which were
12 not included on the balance sheet realistic market
13 value, and certain back office recoveries which were
14 supposed to have been made subsequent to the date of
5 15 the audit.

16 Q This was all discussed with Mr. Feldman?
17 A Yes.

18 Q You came to the conclusion or the agreement
19 for purposes of working this up to this \$21,750,000
20 figure that book value on December 31st was zero?

21 A Yes.

22 Q Would it be fair to state that you take
23 the million and a half to \$3,000,000 in losses between
24 September 26th and December 31st on one side on the
25 credit side and on the debit side you put down the equity

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1

Richardson

22

2 at September 26th plus the re-evaluation of the
3 Blair assets you refer to and then washed out the
4 zero, approximately?

5 A There would have been a certain cushion on the
6 side of the assets, but this was what we thought it
7 was a conservative result. The revalued assets were
8 sufficient at least to pick up the estimated losses.

9 Q Starting from the proposition that book
10 value was zero at December 31, 1969 did you then go
11 to figures showing the capital of the company at
12 February 28, 1970, in house figures?

13 A By capital, you mean the subordinated liabilities?

14 Q Yes.

15 A Yes.

16 Q There was no equity at this point?

17 A No. The equity was a minus figure.

18 Q That was discussed with Mr. Feldman?

19 A Yes. The estimated \$2,000,000 losses in
20 January and February.

21 Q You subtracted \$2,000,000 loss in January
22 and February from the total subordinated capital shown
23 on a schedule on a format to Exhibit 702?

24 A Yes.

25 Q From the resulting figure you then further

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

1

Richardson

225

2 subtracted an amount equal to the market value at
3 February 28, 1970, Mr. Melville Islands' loan made
4 in 1970?

5 A Yes.

6 Q This was also discussed with Mr. Feldman?

7 A Yes.

8 Q The reason the value of Mr. Islands' loan
9 made in late February 1970 was subtracted from this,
10 computation was made so as to come up with original
11 capital was for what reason, sir?

12 A Well, it was because it was expected that this
13 loan of Mr. Islands' be withdrawn in some fairly
14 near future time. It would have been possible to
15 include it in the original capital and then to try the
16 value of that account against the original capital
17 when it was withdrawn. But we elected not to include
18 it as part of the original capital and require any
19 charge against that figure if and when it was with-
20 drawn.

21 Q This was discussed with Mr. Feldman?

22 A Yes.

23 Q By you?

24 A Yes sir.

25 Q You previously testified at length in response

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

Luce

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conversations that you had with Dr. Foley since the filing of this suit on September 25, 1970?

A That is substantially correct.

Q Is it correct or isn't it?

A Substantially correct. I don't recall anything specific about those suits. I know that he wished me a Merry Christmas. I know a few things like that. But I don't --

Q Did you discuss your deposition today with Mr. Feldman prior to the commencement of the deposition this morning?

A I didn't discuss it with him this morning.

Q Prior to the commencement of the deposition?

A Yes, that is correct.

Q When did this discussion occur?

A I can tell you there were two discussions. The first one was on April 11th. Now I am getting real specific on my dates. The reason I remember that, I came in here to have lunch with Mr. Feldman and I walked out with a subpoena.

Q What did Mr. Feldman say to you on that date?

A Well, he just thought that I ought to talk to everybody in concert and that --

Q That's not

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts

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A That I ought to talk to everybody in concert,
I mean the group.

Q Which group, which individuals?

A These people here. I thought there were going to
be more. That was about it. I know I was pretty well
annoyed. I don't remember much more than that was said.

Q When was the next time you talked to
Mr. Feldman?

A Monday.

Q This past Monday?

A This past Monday, yes.

Q That was April 30th, yesterday. Is that what
you mean, or you mean a week ago?

A No. Was it yesterday?

Q Or was it April 23rd, a week from this past
Monday?

A I am trying to think. Just a second. I believe it
was yesterday. I am trying to think what I did yesterday.
Yes, I ran into you here (indicating Mr. Weiss).

THE WITNESS: Was that yesterday?

MR. WEISS: It was yesterday. I want you to
give your testimony so I am not going to help you.

A I made my eye witness, didn't I? Because I was
working most of the day.

Exhibit 4 Annexed to Affidavit of Jeffrey A. Barist
Excerpts from Deposition Transcripts
Luce

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1 Q What was said yesterday in your discussions
2 with -- first of all, whom did you talk to yesterday
3 in this office?

4 A I talked to both Mr. Feldman and Mr. Weiss.

5 Q What did Mr. Feldman say to you yesterday
6 and what did you say to him?

7 A This was more or less a meeting at my request.
8 I don't do this sort of thing every day, and it was
9 kind of -- I wanted to know what it was all about.

10 And so they told me, tell it like it is.

11 Q Did you discuss the substance of Mr. Foley's
12 transaction yesterday?

13 A No. We didn't discuss his --

14 Q Or your role with respect to the negotiations
15 at Blair?

16 A I tried to and they pulled the same stunt Mr. Weiss
17 just pulled on me now when I was trying to check certain
18 things. They refused to give me any information.

19 Q Give me an example. What sort of things did
20 you want to check?

21 A I believe I asked for some dates, a couple of dates,
22 of Mr. Feldman, and said this has to be your recollection
23 not mine.

24 Q Which date did you ask for?

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A I have forgotten which ones they were. I realized that I was, and you can realize since, I was very much off on dates. The only date they gave me was the date of the signing of this agreement, which I had forgotten. I knew it was April sometime, but I had forgotten April 3rd.

Q What other dates did you ask for?

A I asked for the date I went over personally to Blair & Co., if he had remembered that, and he hadn't. But I found it out from the records at home.

Those were the only two dates I remember.

Q What else did Mr. Feldman say to you yesterday, anything, if you recall?

A I was here only a short while. Nothing of any substance.

Q Did you discuss any representations that were made to Mr. Foley?

A No.

Q Anything about things that defendants may have said to Mr. Foley that weren't true?

A No. No. There was very little discussion about the case, really. The main reason I was in here was because, as I say, this is an unusual business for me.

Q So is to your testimony that Mr. Feldman told

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nothing to you yesterday other than that he wouldn't tell you the date on which you became an employee of Blair, and he would tell you the date on which --

A Well, I sort of felt that he was leaning backwards and I thought he could have helped me maybe with a specific date or so, and he was leaning back and he said to me, this has to be my recollection.

Q Did Mr. Weiss say anything to you yesterday? I believe you had a discussion with Mr. Weiss. What did he say?

A He was in there part of the time. I don't recall that he said much of anything.

Q Did you say anything to Mr. Weiss?

A No. What I had said, I said previously, was while he was in the room, was directed to both of them.

Q Other than April 11, 1973 and April 30, 1973, when was the last communication you had with Mr. Feldman or Mr. Milberg or Mr. Weiss with respect to Mr. Foley?

A None.

Q None?

A No.

Q Before April 11, 1973, when was the next preceding discussion you had with Mr. Feldman with regard to Mr. Foley or which reported by Mr. Luce?

**Affidavit of Edward N. Costikyan in Opposition to
Motion to Disqualify**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
70 Civ. 4194

J.P. FOLEY, INC., JOHN P. FOLEY,
JR., ANNE A. FOLEY and ANITA
SALISBURY,

(C.H.T.)

Plaintiffs, :

-against-

OLIVER D. VANDERBILT, et al.,

AFFIDAVIT

Defendants. :

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

EDWARD N. COSTIKYAN, being sworn, states:

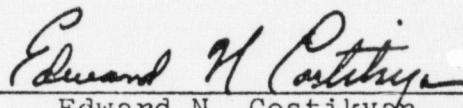
1. I am a member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison. We have been retained as counsel to the plaintiffs in opposing the motion of defendant Arthur Young & Co. ("Arthur Young") to disqualify the law firm of Milberg & Weiss as plaintiffs' trial counsel in this action.

2. Arthur Young's motion is predicated on Disciplinary Rules 5-101(B) and 5-102(A) in Canon 5 of the Code of Professional Responsibility. The accompanying affidavits of Lawrence Milberg, Esq., plaintiff John P. Foley, Jr. and Leonard Feldman, Esq. show that these Rules have absolutely no application in the circumstances of this case. We discuss this conclusion in further detail in our accompanying brief.

*Affidavit of Edward N. Costikyan in Opposition to
Motion to Disqualify*

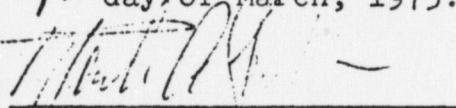
3. In our view, a most unfortunate -- indeed dangerous -- precedent would be set if Arthur Young's motion were granted. It would enable a party to engineer disqualification of opposing counsel just before the trial. It would transform ethical considerations into tactical weapons. It would inject an element of uncertainty into the practice of many large law firms in this city (such as the very firm representing Arthur Young in this action), which represent clients in both the litigated and non-litigated aspects of the same matters -- and it would thereby deprive many clients of representation by counsel of their choice. None of these was a consequence that the Disciplinary Rules intended to produce. And none would follow if the Rules were properly applied, and not as Arthur Young would apply them here.

4. We respectfully request and urge that Arthur Young's motion be denied.


Edward N. Costikyan

Sworn to before me this

11th day of March, 1975.


Notary Public

MARK A. BELNICK
Notary Public, State of New York
No. 31-5254705
Qualified in New York County
Commission Expires March 30, 1974

**Affidavit of Lawrence Milberg in Opposition to
Motion to Disqualify**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

J.P. FOLEY, INC., et al., :
Plaintiffs, : 70 Civ. 4194
-against- : (C.H.T.)
OLIVER D. VANDERBILT, et al., :
Defendants. : AFFIDAVIT
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAWRENCE MILBERG, being sworn, states:

1. I am a member of the firm of Milberg & Weiss. I submit this affidavit in opposition to the motion of defendant Arthur Young & Co. ("Arthur Young") to disqualify my firm as trial counsel for plaintiffs in this action.

2. Arthur Young claims that Disciplinary Rules 5-101(B) and 5-102(A) of the Code of Professional Responsibility preclude any member of Milberg & Weiss from trying this case because an attorney who is "counsel to" the firm (Leonard Feldman, Esq.) may be a witness at trial. Arthur Young is wrong, for the following reasons.

3. Leonard Feldman has never been, and is not now, "in the firm" of Milberg & Weiss. He will not share in our contingent fee in this litigation. He will not be an advocate, trial counsel, or a member of our trial team in this case. Nor, in all likelihood, will he ever be in the courtroom, as he is suffering from a severe heart condition. He

Affidavit of Lawrence Milberg in Opposition to Motion to Disqualify

will not be called as a witness by plaintiffs during their case-in-chief. If his testimony is offered at all, it will be during rebuttal and only because the defendants have made it necessary. His "counsel to" relationship with Milberg & Weiss will prejudice nobody because there is no reason for it ever to be mentioned to the jury.

4. As "counsel to" our firm, Mr. Feldman regularly consults with us on a variety of legal matters. But he does not participate in firm profits or losses. He has never received a salary from the firm, and his clients are almost exclusively distinct and separate from ours. We have shared fees with Mr. Feldman on but a few specific occasions when we have formally worked together either at his, or our own, request. Mr. Feldman paid the firm for the space it rented to him, at a fixed rate.

5. As "of counsel" to our firm in this particular litigation, Mr. Feldman has no interest in any fee my firm may receive. He has assisted in preparing for trial because of his expertise and familiarity with the underlying documents and transactions. But any compensation he receives for such services will not come from or through Milberg & Weiss. And, it has never been, and is not now, our intention that Mr. Feldman would play any role in trying the case.

6. Nor is our intention to call Mr. Feldman as a witness during plaintiffs' affirmative case. His testimony is unnecessary to plaintiffs' *prima facie* case. I never told Mr. Barist the contrary. I said only what is still true today -- namely, that Mr. Feldman's testimony might be necessary in rebuttal if the defendants force it by attributing

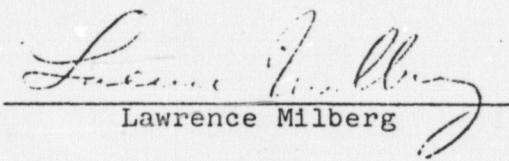
statements or knowledge to him during their case.* While the defendants have the right to set up their trial strategy in any manner they deem appropriate, they do not also have the right to "set up" disqualification of opposing counsel.

Conclusion

7. DRs 5-101(B) and 5-102(A) were never intended to apply to circumstances such as those in this case. They certainly were not designed as tactical adversary weapons. Yet that is precisely how Arthur Young would use them here.

8. This is perhaps best demonstrated by the timing of the motion. Arthur Young has admittedly been aware of the supposed "disqualifying" facts at least since May 1974 (see Barist Aff., at 2). But it nevertheless waited until the eve of trial -- the time when plaintiffs would suffer the maximum prejudice if forced to find new trial counsel -- to make its motion. Its true purpose here, we submit, is tactical rather than vindication of an ethical standard. What it really seeks is to "disqualify" the plaintiffs from effectively prosecuting their substantial claims. This Court should not allow it.

9. For the foregoing reasons, and those set forth in the accompanying affidavits and brief, we respectfully request that Arthur Young's motion be denied.


Lawrence Milberg

Sworn to before me this

13th day of March, 1975.

Samuel H. Turetsky
Notary Public
SAMUEL H. TURETSKY
NOTARY PUBLIC, State of New York
No. 31-4025355
Qualified in New York City
Commission Expires March 1, 1975

*Even then, because of Mr. Feldman's medical problem, his testimony would probably have to come in through the transcript of his deposition.

Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

J.P. FOLEY, INC., et al., : 70 Civ. 4194

Plaintiffs, : (C.H.T.)

-against-

OLIVER D. VANDERBILT, et al., : AFFIDAVIT

Defendants. :

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN P. FOLEY, JR., being sworn, states:

1. I am an individual plaintiff in this lawsuit and I am also the president, and a principal shareholder, of the corporate plaintiff. I submit this affidavit on behalf of all plaintiffs in opposition to the motion of defendant Arthur Young & Co. ("Arthur Young") to disqualify the law firm of Milberg & Weiss as our trial counsel in this action.

There Is No Basis For Disqualification

2. Arthur Young's motion is grounded on the assertion that a lawyer who represented me during the events leading to this suit (Leonard Feldman), and who is "counsel to" Milberg & Weiss, may -- because of the defendants' trial strategy -- be a witness at trial. The short answer to this is that plaintiffs have no intention of calling Mr. Feldman as a witness during our case-in-chief.

3. Further, Mr. Feldman is not a member of Milberg & Weiss. Nor will he act as our trial counsel in this action.

*Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify*

or be seated at counsel's table. In fact, because of his serious heart condition, Mr. Feldman probably will not even be in the courtroom during trial. And, whether he appears as a witness or not, there need never be any reference during trial to his "counsel to" relationship with Milberg & Weiss.

4. Given these facts, there is no basis for Arthur Young's motion. No harm could be suffered by Arthur Young, or any other party, if the motion is denied. In contrast, if the motion is granted, my co-plaintiffs and I will be severely prejudiced: We will be deprived of effective trial representation, by counsel of our choice -- and our ability to prosecute this litigation will be hindered, if not destroyed.

The Prejudice to Plaintiffs If
the Motion is Granted

5. This is a complex securities fraud case, in which plaintiffs seek damages in excess of \$3 million, arising out of our 1970 investment in defendant Blair & Co. ("Blair"). The lawsuit involves many intricate questions of fact and law, which Milberg & Weiss have been investigating for over four years of active pretrial proceedings. For example, there have been 31 days of deposition alone, producing thousands of pages of transcript to be reviewed, digested, and readied for use at trial. But after all this, Arthur Young would now force us to search for new counsel to start fresh and take over management of the action -- on the eve of trial. Even if we could find counsel of sufficient competence willing to undertake such a monumental task, the costs would be staggering.

*Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify*

6. Moreover, our present attorneys, Milberg & Weiss, are perhaps uniquely qualified to try this lawsuit. For example, a ~~counting~~ questions abound in the case, and Milberg & Weiss have resident expertise in the accounting field. Melvyn I. Weiss, Esq., who will conduct the trial, has a BBA degree in accounting; and Jared Specter, Esq., one of Mr. Weiss' partners involved in this case, is a CPA as well as an attorney. Also, I am advised that the firm itself has actually tried numerous securities fraud cases of this kind. Thus, I believe that few other law firms (if any) could offer us the specialized services we need, that we have received, and that we expect at trial, from Milberg & Weiss -- especially not at this late stage in the proceedings.

7. Arthur Young undoubtedly recognizes that disqualification of Milberg & Weiss at this point could deal a fatal blow to our case. But that, I submit, is the very consequence it hopes to achieve through its motion. Far from seeking to resolve any ethical problem (for there is none), Arthur Young apparently hopes to resolve its own liability problems by disabling us from effectively prosecuting our claims. I trust this Court will not allow that result.

The Role of Leonard Feldman

8. Arthur Young reveals its tactical purpose through various statements in its counsel's moving affidavit dealing with the merits of the lawsuit.* These statements,

* Consider, for example, this statement on the very first page of Mr. Barist's affidavit: "Arthur Young was Blair's independent auditor and did not participate in any of the negotiations of the Foley-Blair agreement." Whether or not this is true, it is wholly irrelevant to the issue on this motion.

*Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify*

of course, have nothing to do with whether Milberg & Weiss should be disqualified as trial counsel because of Leonard Feldman's role. We will not burden this Court with a response, except to reiterate our disagreement with Arthur Young's view of the case against it. Our detailed answer will be given when the merits are properly in issue -- at trial.

9. Returning to this motion, our answer to Arthur Young's legal arguments is contained in the accompanying brief and affidavits of our attorneys. In the remainder of this affidavit, I shall discuss Leonard Feldman's precise role, hopefully correcting the misimpressions fostered by Mr. Barist's moving affidavit.

10. Commencing in January 1970, I began negotiations with Blair concerning a possible investment by me and the other plaintiffs in this action. I was represented in those negotiations by Leonard Feldman, and not by Milberg & Weiss.

11. Late in the afternoon on Friday, April 3, 1970, our negotiations concluded and we made our investment. On Monday morning, the first business day thereafter, the New York Stock Exchange ordered the liquidation of all insider subordinated securities of Blair, which led to losses to my associates and me of our entire investment, approximately \$3 million. I then began to discover facts, previously unknown to me, which indicated that the defendants had defrauded my associates and me with respect to the Blair transaction, and which motivated me to bring this lawsuit. I needed lawyers to conduct such a litigation. Mr. Feldman suggested that I consult Milberg & Weiss. I did. And my associates and I subsequently retained them to prosecute our claims.

*Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify*

12. At no time before this lawsuit was planned did Milberg & Weiss represent me or furnish any professional services to me whatsoever. My only lawyer in the matter was Leonard Feldman. I understood that Mr. Feldman had his office in a suite maintained by Milberg & Weiss, but I had no contact or relationship with that firm. In short, they were not my attorneys.

13. Once this litigation was instituted, Milberg & Weiss became my counsel in this matter. Mr. Feldman has assisted the firm in the litigation, but, as I stated earlier, he will not be trial counsel or part of the trial team. Nor is he sharing in the fee Milberg & Weiss may receive. Contrary to the distortions in Mr. Barist's affidavit, the simple fact is that plaintiffs have a contingent fee arrangement with Milberg & Weiss alone.

14. Also, and again contrary to Mr. Barist's statements, Mr. Feldman's testimony is not "crucial to plaintiffs' case" (Barist Aff., at 3). I am advised by Milberg & Weiss that our case-in-chief will be presented without any testimony from Mr. Feldman, and that this would have been so even if Arthur Young's motion had never been made. The only reason Mr. Feldman's testimony could be necessary is that the defendants called him as a deposition witness, and may now intend to set up their trial defense so as to assert that Mr. Feldman had certain knowledge or made certain statements. We would counter any such assertions with Mr. Feldman's testimony during our rebuttal case; but even then, I am advised that Mr. Feldman's testimony might have to be presented through deposition transcript because of his heart condition.

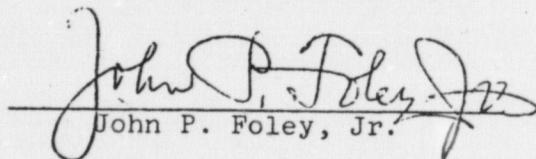
*Affidavit of John P. Foley, Jr. in Opposition to
Motion to Disqualify*

15. Finally, of course, Mr. Feldman has not been, and is not, in the firm of Milberg & Weiss. His "counsel to" relationship need never be mentioned to the jury. He will not be in court. Hence, there is no danger, as Mr. Barist asserts, that our trial counsel will be arguing their own credibility to the jury.

Conclusion

16. This case is a very serious one for the plaintiffs. Most of my capital, for which I worked a lifetime, has been taken from me, wrongfully I believe, by the acts of the defendants. If I am to enjoy any recovery, it will have to come soon, for I am already 64 years old. The least consequence of the relief sought by Arthur Young is that trial will inevitably be delayed.

17. My co-plaintiffs and I have great confidence in Milberg & Weiss. We want them to continue as our counsel. We want them to try this case. Accordingly, we urge this Court, most respectfully, to deny Arthur Young's motion and to permit this four-year old action to go to judgment.


John P. Foley, Jr.

Sworn to before me this
11th day of March, 1975.

Samuel H. Turetsky
Notary Public

SAMUEL H. TURETSKY
NOTARY PUBLIC, State of New York
No. 31-4025355
Qualified in New York County
Commission Expires March 30, 1975

**Affidavit of Leonard Feldman in Opposition to
Motion to Disqualify**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.P. FOLEY & CO., INC., JOHN P. FOLEY,
ANNE A. FOLEY and ANITA SALISBURY,

Plaintiffs,

-against-

OLIVER D. VANDERBILT, JAMES B. RAMSEY, JR.,
THOMAS McNELL, BRUCE RAYMOND, RUCHARD Mc-
DERMOTT, WILLIAM GROSSCRUGER, FRANK LYNCH,
GEORGE MORPURGO, MELVILLE H. IRELAND, JAMES
J. RUSH, BLAIR & CO., INC., and ARTHUR YOUNG
& COMPANY

Defendants.

AFFIDAVIT

70 Civ. 4194

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STATE OF NEW YORK)
: SS.:
COUNTY OF SUFFOLK)

LEONARD FELDMAN, being duly sworn, deposes and
says:

I was the attorney for the plaintiffs in the course
of their negotiations with the defendants, and make this affi-
davit in response to that of Mr. Jeffrey A. Barist, who is the
sole affiant in support of defendant Young's motion to disqualify
the firm of Milberg & Weiss, Esqs., from appearing herein as
plaintiffs' lawyers.

In his affidavit Mr. Barist affirms, as if on his own
knowledge and as facts, statements of which he has and can have no
personal knowledge.

I did not meet Mr. Barist until after this action started.
Having met him, I at no time had any conversation with him relative
to my association with the plaintiffs or Milberg & Weiss. Thus,
his averments as to my fee arrangement on this case are completely
inaccurate and can only be attributed to an autistic imagination.

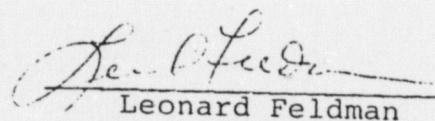
*Affidavit of Leonard Feldman in Opposition to
Motion to Disqualify*

I have never entrusted Mr. Barist with my confidence and have limited my discussions with him to the barest minimum.

Mr. Narist's argument based on his anticipation of my participation in the trial is fantasy. My health does not permit any such activity. Should the Court deem it appropriate I am prepared to submit medical confirmation of the foregoing.

Concerning my fee for services rendered by me in this matter, I have never discussed this with Mr. Barist. At the appropriate time I will issue my bill for the time and effort spent by me and I have no interest in the fee of Milberg & Weiss or agreement to participate therein. When Mr. Barist states that I will share in the Milberg & Weiss fee he is in absolute error.

For the reasons stated, I respectfully submit to this Honorable Court that there is no merit to the motion and it should be denied.


Leonard Feldman

Sworn to before me this
13 day of March, 1975



PATRICIA K. COLE
Notary Public State of New York
No. 30-5755210
Qualified in Nassau County
Commission Expires March 30, 1976

JA 95

Reply Affidavit of David Hartfield, Jr. in
Support of Motion to Disqualify

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
J. P. FOLEY & CO., INC., JOHN P. :
FOLEY, ANNE A. FOLEY and ANITA :
SALISBURY, :
Plaintiffs, : 70 Civ. 4194
-against- : CHT

OLIVER D. VANDERBILT, JAMES B. :
RAMSEY, JR., THOMAS McNEIL, BRUCE : REPLY AFFIDAVIT
RAYMOND, RICHARD McDERMOTT, WILLIAM :
GROSSCRUGER, FRANK LYNCH, GEORGE :
MORPURGO, MELVILLE H. IRELAND, :
JAMES J. RUSH, BLAIR & CO., INC., :
and ARTHUR YOUNG & COMPANY, :
Defendants. :

----- x
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

David Hartfield, Jr., being sworn, says:

I am a member of the bar of this Court and of the firm of White & Case, attorneys for defendant Arthur Young & Company ("Arthur Young"). This affidavit is in reply to plaintiffs' papers opposing Arthur Young's motion to require the firm of Milberg & Weiss to leave the trial of this action to other, qualified counsel.

The provisions of Canon 5 of the Code of Professional Responsibility whose enforcement is sought here are straightforward. They provide that "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness . . .". DR 5-101(B); see also DR 5-102(A). There are four exceptions but plaintiffs do not cite even one of them in their answering papers.

*Reply Affidavit of David Hartfield, Jr. in Support of
Motion to Disqualify*

Faced with the clear mandate of the Code, plaintiffs seek to have this Court carve four additional exceptions out of the Code. First, they contend that the Code should be ignored because this motion is allegedly "a tactical weapon" brought by opposing counsel to "engineer" the disqualification of plaintiffs' attorneys "on the eve of trial". Second, they suggest that disqualification is unnecessary because their current trial strategy calls for the attorney to act as a witness on rebuttal, rather than in plaintiffs' case-in-chief. Third, plaintiffs argue that the lawyer is not "in the firm" of Milberg & Weiss because he is "of counsel" and has a separate contingent fee arrangement with the client. Fourth, plaintiffs suggest that enforcement of this provision of the Code would "inject an element of uncertainty into the practice of many large law firms in this city".

Plaintiffs' proposed exceptions are precisely those that the Code of Professional Responsibility was designed against. No firm - large or small - is permitted to accept employment in the circumstances here, and if that firm accepts employment despite the mandate of the Code its disqualification is regrettably necessary.

With respect to plaintiffs' claim that this motion is a "tactical weapon" brought to "engineer" the disqualification of plaintiffs' counsel on "the eve of trial".

The Code states that "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . .". The Code thus

*Reply Affidavit of David Hartfield, Jr. in Support of
Motion to Disqualify*

places the burden on the attorney offered employment in litigation to refuse to accept the retainer if he or a lawyer in his firm "ought to" be called as a witness. The burden is not on opposing counsel to make a motion to disqualify, because such a motion can only be made when the full facts of the lawyer's role come to light. Since it is also a motion of last resort, it can rarely be made prior to the completion of discovery, when counsel fails to step aside and substitute qualified trial attorneys.

The facts of this matter exemplify why the Code makes it the responsibility of the attorney to refuse employment in a matter if "he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness". When plaintiffs started this lawsuit, they and their attorneys were well apprised of the role of Leonard Feldman in the negotiation of this transaction and of the pivotal nature of his testimony. Arthur Young, a stranger to the Foley-Blair transaction, was not aware of these facts, and as the Court is aware, plaintiffs and their lawyers claimed the attorney-client privilege in an attempt to conceal Mr. Feldman's role. Mr. Feldman, acting as Mr. Foley's counsel at the Foley deposition, objected to every threshold question involving Mr. Feldman's role in the negotiation of the complained-of transaction, and when Arthur Young moved to compel answers to these questions, we were met with the claim that Feldman was a "mere scrivener". (See Barist affidavit, p. 4). In January, 1974 this Court directed Messrs. Foley and Feldman to appear for further deposition, at which their respective

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roles in the negotiation of this transaction could be explored, and it was not until later that year that the privilege was waived and the Foley and Feldman depositions were taken and concluded.

, At about the time of the Feldman deposition, Jeffrey A. Barist, Esq., then a lawyer in my firm and now a member thereof, who had been working on this case, discussed with me the dual lawyer-witness Feldman role which was becoming apparent. We concluded it would not be appropriate to suggest their disqualification to Messrs. Milberg and Weiss until after the completion of the Foley and Feldman depositions, because (1) we needed full facts as to the basis for their disqualification before asking them to disqualify themselves, and (2) if the facts required disqualification, we intended to afford Milberg & Weiss every opportunity to step aside before bringing this motion. When the depositions were completed, and the full facts were known, we wrote on May 20, 1974 to plaintiffs' attorneys calling their attention to the Code and advising them as to our view that disqualification was required and that new trial counsel should be obtained. (See Exhibit 1, Barist affidavit.) Mr. Barist and I decided to write this letter in the Spring of 1974 in order that no claim would ever be made that disqualification was sought as a tactic on the eve of trial and in order that plaintiff Foley might have ample time to obtain new counsel who would not need to swear his case. We did not receive a substantive answer to Exhibit 1 from Messrs. Milberg and Weiss (other than to acknowledge receipt) until ten months after the problem had been brought to their attention. It was after

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Milberg & Weiss, notwithstanding Exhibit 1, made clear their intention of remaining in this case that we felt compelled to make this motion in order to protect our client. This motion has also been made before the filing of a Note of Issue.

Plaintiffs now assert that Arthur Young's refusal to act precipitously without knowledge of the full facts amounts to a "tactical weapon" to "engineer" disqualification at a late date. Their argument really is that a law firm may accept employment in violation of DR 5-101(B), attempt to deny the role of the attorney as a fact witness during initial pre-trial discovery, and then claim that the opposing party is engaging in "last minute" tactics although ten months have passed after the facts requiring disqualification have been brought home to plaintiffs' attorneys. Such an exception cannot be read into the Code.

With respect to plaintiffs' claim that disqualification should be denied because their current trial strategy calls for the attorney to act as a rebuttal witness.

The Code states that "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . ." DR 5-101(B). This clear and direct language makes no distinction between primary and rebuttal testimony; in fact, the prohibition would apply even where the attorney is called as a witness by the adverse party. Compare DR 5-102(A).

Plaintiffs' proposed exception permitting a dual role where the witness is not called until rebuttal testimony must be rejected. The reasons for the Code

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provision are as compelling when the attorney is called in rebuttal as when he is called on direct. The prejudice to defendants is as serious no matter how plaintiffs intend to structure their case. Moreover, plaintiffs' assertion that the "necessity" for Mr. Feldman's testimony will arise because of defendants' trial strategy is frivolous. (Memorandum, page 5) Mr. Feldman's testimony is compelled not by the defendants but by the facts. Mr. Feldman, along with Foley, participated in the negotiation of the transaction, and what he was told is necessarily relevant to this alleged non-disclosure case. For example, as the plaintiffs well know from the deposition record, John Richardson, in-house attorney for Blair & Co., Inc. during the negotiation of the Foley transaction, testified that Mr. Feldman was informed of matters germane to Blair's financial condition which plaintiffs and Mr. Feldman denied ever knowing. Mr. Feldman's testimony will have to be offered by them at one time or another.

Equally important, plaintiffs cannot create a Code exception where the attorney is called as a rebuttal rather than a direct witness lest attorneys structure their cases for the purpose of avoiding the strictures of the Code. One purpose of the Code of Professional Responsibility is to remove from litigation strategy any consideration of the desire of counsel to remain in the case. In this connection, we note that plaintiffs' counsel now propose to prove a non-disclosure case without offering the testimony of one of the two parties who participated in the negotiations.

Finally, plaintiffs refer to the state of Mr.

JA 101

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Feldman's health, although they never assert that he is too ill to testify. In any event, the Code does not make any distinction between live testimony and testimony read in through a deposition. In either case, the credibility of Mr. Feldman's testimony will be central to the case.

With respect to plaintiffs' claim that Mr. Feldman is only "of counsel" to Milberg & Weiss.

The Code states that "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . .". The Code does not restrict its rule to partners but to any lawyer "in" the firm. As counsel to Milberg & Weiss, Mr. Feldman is "in" the firm for the purposes of this prohibition. Indeed, plaintiffs' description of the economic relationship between Mr. Feldman and Milberg & Weiss might accurately describe that of many partnerships in the practice of law.

Plaintiffs suggest that the prohibition of the Code should be avoided here because Mr. Feldman does not have a direct interest in the contingency fee arrangement of Milberg & Weiss. Mr. Feldman himself attributes the statements in the Barist moving affidavit to the "autistic imagination" of counsel for Arthur Young, and he states that he never discussed his fee arrangement with us. However, both Mr. Foley and Mr. Feldman testified with regard to Mr. Foley's outstanding obligations to Mr. Feldman, and the pages of their deposition transcripts are attached hereto so that the Court can determine itself the facts of the matter. (Exhibit 1) These facts show that the

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compensation of Messrs. Feldman, Milberg and Weiss is dependent on the outcome of this case, and whether they have separate contingency arrangements with Mr. Foley, or one, is an insubstantial distinction.

Equally insubstantial is plaintiffs' claim that Mr. Feldman may not appear at counsel table and that Mr. Feldman's relation with Milberg & Weiss need never be made known to the jury. First, the Code makes no distinction depending upon whether counsel sits at the witness table. Second, a basic issue herein is whether Foley availed himself of information contained in documents filed with the NYSE and SEC. The jury is entitled to know that Mr. Feldman, who negotiated a complex securities arrangement, was at the time "of counsel" to Messrs. Milberg and Weiss, whose expertise in accounting and securities matters is attested to in their answering papers herein. There is no averment in any of the answering affidavits here that Mr. Feldman failed to consult with members of the firm to which he was "of counsel" about a transaction as to which Milberg & Weiss assert they are "uniquely qualified". Indeed, the deposition record shows there was such consultation. (See Barist affidavit, p. 9).

With respect to the assertion that this motion should be denied because it would "inject an element of uncertainty into the practice of many large law firms in this city".

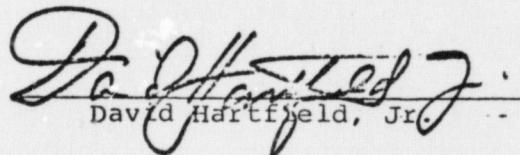
Plaintiffs' final reason for seeking denial of this motion is that it would make "uncertain" the practices of "many large law firms in this city (such as the very firm representing Arthur Young in this action)". Suffice it to say that no "uncertainty" would be injected into our

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practice. Indeed, we suggest that "uncertainty" is most generated where spurious exceptions are read into clear rules. As for the lawyer - whether his firm be large or small - who accepts "employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness", he and his client can only look to him as the cause of any resultant "uncertainty". If Milberg & Weiss wished "certainty" it was incumbent upon them, knowing the facts as they did, to have brought the issue to this Court's attention for guidance at the very inception of this litigation.

In conclusion, I have also read the letter of March 17, 1975 from Mr. Costikyan to the Court, requesting oral argument on this motion. I believe that the requirement of disqualification is so clear here that oral argument would be an unnecessary burden on the Court's time.

WHEREFORE, it is respectfully requested that the Code of Professional Responsibility be enforced as it was written, and that Milberg & Weiss be directed to substitute qualified trial counsel in their stead without further delay.



David Hartfield, Jr.

Sworn to before me this
31st day of March, 1975.

ALLAN L. GROPPER
Notary Public

ALLAN L. GROPPER
Notary Public, State of New York
No. 31-6660800
Qualified in New York County
Commission Expires March 30, 1976

Exhibit 1 Annexed to Reply Affidavit of
David Hartfield, Jr.

Excerpts from Deposition Transcripts
Folcy

JA 104
1099

16

2 to hear it.

3 Q Going back to Mr. Feldman, at the time
4 you retained him to represent you with respect to
5 the Blair transaction, was your agreement as to his
6 compensation in writing or oral?

7 A Oral.

8 Q Did you make an agreement with him as to
9 his compensation before the transaction was
10 consummated?

11 MR. MILEBERG: You mean as to the
12 extent of his compensation or the fact of his
13 compensation? There is a difference, Jeffrey.

14 MR. BARIST: First let's do it, the
15 fact of his compensation.

16 Q Was that done before the deal was
17 consummated?

18 A I would say yes.

19 Q Had you made an agreement with him as to
20 the manner or nature of his compensation before the
21 deal was consummated?

22 A Not specifically, no.

23 Q Did you have a general understanding
24 with Mr. Feldman?

25 A That's difficult to answer.

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.

Excerpts from Deposition Transcripts

JA 105
1100

Foley

Q Was Mr. Feldman in any way to be compensated by means of options you received on Blair or CMC stock?

A No.

Q Was he to be paid by you in cash, you know, receive money for the services?

A I would say yes.

Q Was he to have any participation in any of the benefits, if any, you received from the Blair transaction?

A I don't know how to answer that question.

Q Was he to be paid --

A I don't understand the question.

Q Was he to be compensated, for example, out of any securities in Blair you received, Blair stock or CMC stock?

A No.

MR. BARIST: Could you read back the question when I said was he to be paid in cash, money?

(The prior question and answer were read.)

Q I guess I might as well ask the question directly, Mr. Foley. How was Mr. Feldman to be compensated by you? What was your understanding with

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Exhibit 1 Annexed to Repl. Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 106

Foley

1101

2 Mr. Feldman at the time you went into the transaction?

3 A I would say we hadn't worked that out
4 yet, Mr. Barist.

5 Q Did you ever have discussions with him?

6 A Pardon?

7 Q Did you ever have discussions with him
8 on that regard?

9 A Again, that would be a very difficult
10 question to answer, in all honesty. I'm sure he knew
11 that I was good for it. If he had a bill he submitted
12 to me, I'm sure he knew that I would pay it and
13 wouldn't question the bill.

14 Q Had he submitted a bill to you?

15 A I testified that he had not submitted a
16 bill, that's right, sir.

17 Q How was he to be compensated for the
18 Hayden, Stone transaction?

19 A He was paid by Hayden, Stone, that's my
20 understanding.

21 Q I am going to state for the record--

22 A Come, where is your imagination, Mr.
23 Barist?

24 MR. BARIST: I am going to state
25 for the record, I am confused, and it really

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.

Excerpts from Deposition Transcripts

JA 107

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Foley

1102

2 doesn't help me any to have Mr. Milberg and Mr.
3 Foley laugh at me --

4 MR. MILBERG: We are laughing at
5 you because we realize this came as a big surprise
6 to you.

7 Q Mr. Feldman was paid by Hayden, Stone?

8 A That's my understanding.

9 Q Was he acting as your lawyer on the Hayden,
10 Stone transaction?

11 A Yes, he was.

12 Q Was Blair supposed to pay Mr. Feldman?

13 A I have no knowledge of any such discussion,
14 Mr. Barist.

15 Q Did you ever have discussions with Mr.
16 Feldman --

17 A You mean about his being compensated by
18 Blair?

19 Q Yes.

20 A No, I don't recall any such discussion.

21 Q Who was to pay Mr. Feldman for his
22 activities in regard to your transaction with Blair?

23 A It was my understanding that I was going
24 to pay him, Mr. Barist.

25 Q How were you going to pay him? On what

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2 basis?

3 A We had not worked that out.

4 Q Did you ever have any discussions with
5 him as to that?

6 A Again, within the time period, right?

7 MR. MILBERG: Any time.

8 Q Let's start with up through April 3rd.

9 A I don't recall our discussing exactly
10 how he was going to bill me, no, I don't recall.

11 Q Did you have any discussions afterwards?

12 MR. MILBERG: I am going to object.

13 MR. BARIST: Why? The Judge
14 still wants to know what Mr. Feldman's participation
15 was.

16 MR. MILBERG: He said he had no
17 participation in the transaction, and he had
18 no compensation deriving out of the profits or
19 any part of the securities which were involved or
20 which would derive to Mr. Foley out of Blair,
21 and I am not going to permit you to ask that
22 without the Judge specifically ruling that we
23 have a right to go that far in time from the
24 point of the original retainer. That's it.

25 I think you have gone far enough

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 109
1104

41

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Foley

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to develop the nature of the relationship.

3

4

MR. BARIST: I don't think we have
at all.

5

6

MR. MILBERG: You may disagree
with me, but I --

7

8

Q Did you ever have any conversations with
Blair as to how Mr. Feldman was going to be compensated?

9

A Not that I recall, Mr. Barist.

10

11

12

Q Did Mr. Feldman have any discussions
with Blair as to Mr. Feldman making a subordinated
loan?

13

A If he did, he never told me.

14

15

(Magistrate Goettel entered the
hearing room.)

16

17

18

19

20

MR. BARIST: Your Honor, we just
realized an interesting thing. Do you remember
yesterday Mr. Milberg made a very big affair
about the Hayden, Stone affair had nothing to
do with the Judge's order?

21

22

23

24

25

MAGISTRATE GOETTEL: I think his
speech was that he interpreted the Judge's
order as restricting you to the Blair &
Company deals, and that he didn't think it
implicitly allowed you to go back to Hayden, Stone.

Exhibit Annexed to Reply Affidavit of David Hartfield, Jr.
Extracts from Deposition Transcripts

JA 110

Foley

1105

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2 MR. MILBERG: I did say to Mr. Barist
3 on the record, before we submitted it to your
4 Honor, that my view was under the Judge's order
5 he had a right to interrogate as to Blair, and
6 if Blair led him into anything where he could
7 test as to what Mr. Foley testified as to
8 Blair, he could ask him what he wanted about
9 Hayden, Stone, if it was pertinent to the direct
10 examination.

11 I didn't say he couldn't ask about
12 Hayden, Stone under all circumstances.

13 MAGISTRATE GOETTEL: It was the first
14 order we brought up, and I suggested that in
15 reading Judge Tenney's decision, particularly
16 the last page, at first he lists a lot of
17 things that he anticipated you doing, which in
18 effect started with Blair, and then he had
19 directions for you to come back to him, and I
20 didn't restrict you from going to Hayden, Stone
21 as a means of testing his responses with
22 respect to the Blair Company transactions
23 and Mr. Feldman's involvement.

24 I simply suggested that you start
25 it with Blair and go through that first, and

*Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts*

JA 111

43

Foley

1106

then if it became necessary, and I said I
hoped it wouldn't because maybe you would get
what you had to out of Blair and Mr. Feldman,
you could then go to Hayden, Stone.

6 MR. BARIST: I have been over this
7 subject, and I have been all over the lot.

I would like if your Honor could spare me five
minutes.

10 MAGISTRATE GOETTEL: I will warn
11 you this, at 4:00 o'clock there are ten or
12 12 attorneys coming in on limitations of liability -

13 MR. BANISTER: We will be finished
14 by 4:00.

15 MR. MILBERG: There is one series
16 of questions he asked which I objected --

17 MR. BARIST: Let me ask the
18 questions.

19 MR. MILDERG: You have already asked
20 it, and I want to get it into focus, if you
21 don't mind, Jeff.

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 112

1107

44

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Foley

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retained Mr. Feldman in this matter. Dr. Foley
3 answered yes. He asked him what he retained
4 him as. As an attorney. What for? To give
5 legal advice and review any agreements that
6 were put on the table.

7

He asked what his compensation was
8 going to be, and he said, "I was going to
9 pay him." Then he asked him other questions
10 after that -- which in my view establishes
11 the attorney --

12

MAGISTRATE GOETTEL: What were the
13 questions?

14

MR. WILBERG: The next questions
15 were, did you pay him yet, and he said no. Did
16 you have discussions with Mr. Feldman as to how
17 he was going to be paid or when he was going
18 to be paid?

19

I thought that was past what was
20 required to be brought out under the terms of
21 Judge Tenney's order.

22

MAGISTRATE GOETTEL: I don't agree
23 with you, Mr. Wilberg. In fact, even absent
24 Judge Tenney's order, you can ask an attorney
25 whether or not he has certain clients and on

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 113
1108

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Foley

what day he saw them, and things of that nature, and I think the details of his retention in terms of what fee he is paid, and so forth, do not fall within the privilege.

6 MR. MILBERG: I understand that.
7 But the question is whether -- it is not a
8 question of privilege at this stage. It's
9 a question of whether Mr. Feldman was retained
10 as an attorney or a business agent.

11 MAGISTRATE GOETTEL: I understand.
12 You are saying is it relevant to what Judge
13 Tenney sent him back here for?

14 MR. MILBERG: That's correct.

15 MAGISTRATE GOETTEL: I think it
16 is, for this reason: You pay various people
17 in various ways, and very often the way in which
18 you pay a person is indicative of what function
19 he is serving. For example, if you hire a man
20 to build a house, you pay him for the completion
21 at a flat rate. If you hire somebody to supervise
22 the building, he very often is paid on an hourly
23 basis.

24 And if a dispute arises as to whether
25 a man was a contractor or a supervisor on behalf

46

1

2 of the owner, knowing the terms of his
3 compensation will often help you determine that.

4 Now, I am not certain whether a
5 per hour rate here, or a lump rate, or some other
6 percentage rate, necessarily establishes whether
7 he is acting as an attorney or as a business
8 agent. I won't try to predetermine it. But
9 I can see the possibility that the terms of
10 compensation, particularly how it is to
11 be measured, could be indicative of what functions
12 he was serving.

13 MR. MILBERG: I might further add
14 that I permitted questioning as to whether Mr.
15 Feldman had a piece of the action. That I
16 permitted. That was answered in the negative.
17 That I can understand, because I certainly
18 would ask the same questions if I were in
19 Mr. Barist's position.

20 Also the testimony was that Mr.
21 Feldman has not yet been paid. That's one thing.
22 I just want to get this narrowed down to what
23 our real dispute is.

24 MR. BARIST: The most important
25 piece of testimony, and I want to go back to it,

47

Foley

is during the Hayden, Stone negotiations,
during which time Mr. Foley claims Mr. Feldman
was his attorney, Mr. Feldman was not paid by
Mr. Foley, Mr. Feldman was paid by Hayden, Stone.

MR. MILBERG: He never asked any
questions about that. I am not going to object
to that.

MR. BARIST: I couldn't ask a
question without getting either laughter or
an objection.

MR. MILBERG: I'm sorry, the
laughter was not laughter --

MAGISTRATE GOETTEL: Gentlemen,
you are wasting time. You don't have much time
left. Go on with your questions. I think
it is proper to inquire into the terms of Mr.
Feldman's compensation and retention.

BY MR. BARIST:

Q Let's go back to the Hayden, Stone
transaction. This is the first time in which Mr.
Feldman acted for you as your attorney, sir?

A That's right, sir.

Q When Mr. Feldman began acting in regard
to the Hayden, Stone transaction, did you have any

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Excerpts from Deposition Transcripts

JA 116

Foley

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2 discussions with him with respect to his compensation?

3 A No, I did not.

4 Q During the entire course of the Hayden,
5 Stone transaction, did you have any discussions
6 with Mr. Feldman as to his compensation?

7 A I did not, Mr. Barist.

8 Q Did you --

9 A My assumption with him, as with any
10 other professional man, was that I would pay any bill
11 he rendered.

12 Q Did Mr. Feldman render a bill to you out
13 of the Hayden, Stone transaction?

14 A No, sir, he did not.

15 Q Did he render a bill to Hayden, Stone?

16 A I do not know.

17 Q Did he tell you he was paid by Hayden,
18 Stone?

19 A Yes.

20 Q Did he tell you why he was paid by Hayden,
21 Stone?

22 A No, he did not.

23 Q Were you surprised when he told you
24 he was paid by Hayden, Stone?

25 A I can't answer that.

Felcy

MR. BARIST: Would your Honor
direct the witness to answer?

MAGISTRATE GOETTEL: I don't
think it is a proper question.

THE WITNESS: You are right, your
Honor. Thank you very much.

Q Had you had discussions with Hayden,
Stone as to whether or not Hayden, Stone was to
pay Mr. Feldman's fee?

A No.

Q When did Mr. Feldman tell you that
Hayden, Stone paid his fee? Was it before or after
you had begun negotiations with Blair?

A It was well before, as I recall, Mr.
Barist.

Q Did you have an agreement with Mr. Feldman
as to on what basis his fee for serving as your
representative during the Hayden Stone negotiation
would be?

A I believe you asked me that question.
The answer was no.

Q Was Mr. Feldman to be offered any part
of any securities or benefits you received from Hayden,
Stone?

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 118
1113

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Foley

1 A Not to my recollection, no, sir.

3 Q When you retained Mr. Feldman to act
4 as your representative for the Blair transaction,
5 did you have any discussions with him as to his fee?

6 A No, sir.

7 Q Did you ever have any discussions with
8 Mr. Feldman as to his fee with respect to the Blair
9 transaction?

10 A Not that I recall, no, sir.

11 Q Let's go now specifically past April 3,
12 1970.

13 THE WITNESS: His questions, your
14 Honor, up to this point, have all related to
15 the time period up to April 3, 1970. We
16 have had that on the record many times.

17 MAGISTRATE GOETTEL: That's the
18 commencement of this suit?

19 THE WITNESS: The closing.

20 MR. BARIST: April 3, 1970, is the
21 closing of Mr. Foley's transaction with Blair.

22 Q After April 3, 1970, did you have any
23 discussions with Mr. Feldman as to his fee with
24 respect to the Blair transaction?

25 A I can't say that I did, Jeffrey.

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Foley

1114

2 Q Was there ever any communication --
3 forgetting the April 3rd cutoff point. At any point
4 in time, has there ever been any communication
5 between you and Mr. Feldman with respect to any
6 fee of his on the Blair transaction?

7 A I don't recall any communication.

8 With respect to Mr. Feldman now.

9 Q Did you have any communications with
10 anyone with respect to Mr. Feldman's fee on the Blair
11 transaction?

12 A I can't recall that I have. I have
13 received no bill from him, and I can't recall having
14 discussed this with him, per se, that is with him
15 about his fee, Mr. Feldman's fee.

16 Q There came a point in time when you
17 retained Milberg & Weiss?

18 A That's right, sir.

19 Q When did you first retain Milberg & Weiss?

20 A I can't recall that, Jeffrey. I think
21 the first occasion on which Milberg & Weiss was at
22 all involved in my situation was the occasion of the
23 New York Stock Exchange arbitration, at which Mr.
24 Milberg was present.

25 Q This was in approximately August of 1970?

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 120
1115

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Foley

2 A That is right, sir.

3 Q Has Milberg & Weiss billed you for their
4 services?

5 A Not yet, no, sir.

6 Q Do you have any understanding as to whether
7 or not Mr. Feldman's services rendered to you in
8 regard to the Blair transaction are to be included in
9 any bill sent to you by Milberg & Weiss?

10 A I have no -- I have no knowledge of this.

11 Q You have had no discussions along this line?

12 A That is right, sir.

13 MAGISTRATE GOETTEL: Let's go
14 off the record just a second.

15 (Discussion off the record.)

16 MAGISTRATE GOETTEL: Back on
17 the record.

18 Q You did expect to pay Mr. Feldman for his
19 services in regard to the Blair transaction; is that
20 correct?

21 A Yes.

22 Q Did you expect to pay him in money?

23 A Yes, sir.

24 Q Was there any other form of compensation?

25 A Not in love, Mr. Barist.

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Foley

Q Did you expect to pay him by means of
a compensation other than money?

A No.

Q Did you discuss with Mr. Feldman whether
or not his compensation on the Blair transaction was
to be on an hourly basis?

A I had no such discussion with him, Mr.
Barist.

Q Did you have any discussion with him
as to whether it would be a lump sum?

A I had no such discussion with him.

Q Did you ever ask Mr. Feldman why he has
not submitted a bill to you?

A No. I've been very thankful that he
hasn't.

Q Was Mr. Feldman's compensation, in acting
for you on the Blair transaction, in any way contingent
upon the success of the Blair transaction, from your
point of view?

A I've had no discussions with him about
this, Mr. Barist.

Q Was this your understanding, though?

MR. MILBERG: You mean his internal
understanding?

54

Foley

2 MR. BARIST: Yes.

3 MR. MILBERG: I object to that.

4 MAGISTRATE GOETTEL: In effect,
5 what you are asking him now is whether or not
6 he and Mr. Feldman discussed it, did he intend
7 not to pay Mr. Feldman if the transaction didn't
8 turn out well.

9 MR. BARIST: Was it his under-
10 standing that Mr. Feldman was not to be paid
11 if the transaction did not turn out well.

12 MAGISTRATE GOETTEL: I won't allow
13 that question, but I will allow this
14 question, if you want to use it.

15 Was there any implicit under-
16 standing between you and Mr. Feldman that
17 his payment on the Blair matter was contingent
18 upon how the matter turned out?

19 MR. BARIST: I will adopt the
20 Magistrate's question.

21 THE WITNESS: I can't really answer
22 that question, honestly, your Honor. Because
23 I had no discussion with Mr. Feldman in
24 respect to his method or the extent or amount
25 of the charge. So I just don't see how

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2

honestly I can answer that question. My only
3 answer would be, I don't know. I have no
4 basis for an opinion.

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Q Just so we have the record clear on

this, Mr. Foley, up through April 3, 1970, with
respect to your subordinated loan to Blair, your
attorney was Mr. Feldman, not Milberg & Weiss; correct?

A That's right, sir.

Q And Milberg & Weiss first was retained
by you in regard to the New York Stock Exchange
arbitration in the summer of 1970?

A I said that was the first occasion on
which any member of that firm was present at any
of the negotiations or other contacts I had in
respect to the Blair affair, that's right, sir.

Q You testified earlier that Mr. Feldman
had acted in the past as attorney for certain
real estate syndicates in which you participated.

A That's right, sir.

Q Did Mr. Feldman send a bill to these real
estate syndicates?

A I do not know.

Q Do you know who paid Mr. Feldman for his
services in that connection?

56

Foley

1 A I do not know.

3 Q Were you, as a member of the syndicate,
4 ever billed for Mr. Feldman's services, your
5 proportionate share?

6 A No, I was not, sir. Personally, I was not.

7 Q Do you know if the syndicate itself was
8 ever billed?

9 A I don't know. I assume they probably
10 were, but I don't know.

11 Q Were these syndicates partnerships?

12 A It is my understanding that they were,
13 but sometimes they were partnerships, sometimes they
14 got involved in corporations, and sometimes they
15 shifted from one to the other.

16 Q What is your best understanding of how
17 Mr. Feldman was compensated for his services rendered
18 to these real estate syndicates?

19 A I have no knowledge, Mr. Barist. I
20 have no knowledge of the extent of Mr. Feldman's
21 compensation as attorney for those syndications,
22 or the method whereby he was compensated. I have no
23 knowledge. I have never seen any -- I have never
24 discussed it with him or anyone there. I've seen no
25 piece of paper relating to it. I've heard no people

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1 talk about it. I've never concerned myself with it.
2

3 Q Do you have any reason to believe that
4 Mr. Feldman was paid by someone other than the real
5 estate syndicate?

6 A I have no basis for an opinion what-
7 soever in this regard.

8 MAGISTRATE GOETTEL: Mr. Barist,
9 you are beating this to death. Why don't
10 you move on?

11 Q Mr. Foley, maybe there is a lack of
12 imagination. Did Mr. Feldman ever submit a bill to
13 J. P. Foley & Co., Inc.?

14 A No, sir, not to my knowledge.

15 Q Did he ever submit a bill to any of the
16 plaintiffs in this action?

17 A Not to my knowledge, Mr. Barist.

18 Q In regard to the Blair transaction?

19 A Not to my knowledge.

20 Q Did you ever discuss with Blair & Company
21 the manner or method by which Mr. Feldman was to
22 be compensated?

23 A I don't recall ever having had such a
24 discussion, no, sir.

25 MAGISTRATE GOETTEL: Mr. Barist, I am
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Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 126

1121

Foley

2 going to have to get back into these other
3 matters.

4 (Magistrate Goettel left the
5 hearing room.)

6 Q Did you ever have any discussions with
7 anyone with respect to Mr. Feldman's compensation
8 in regard to the Blair matter, at any time?

9 A I can't recall that I did, Mr. Barist.
10 It's conceivable that I might have, but if I did
11 I don't recall it.

12 Q If I change the word "conversation" to
13 "communications," is the answer the same?

14 A Yes, sir.

15 Q Did anyone at Hayden, Stone ever tell
16 you why they paid Mr. Feldman's bill?

17 A I never discussed this with anyone at
18 Hayden, Stone as to why they paid his bill, Mr. Barist.

19 Q Did you ever hear from anyone, at any time,
20 as to why Mr. Feldman rendered a bill to Hayden, Stone
21 or why Hayden, Stone paid it?

22 MR. MILBERG: He never said that
23 Feldman rendered a bill to Hayden, Stone.

24 A I don't know. I never said he rendered
25 a bill to Hayden, Stone.

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

JA 127

Foley

1122

2 Q You said he was paid by Hayden Stone?

3 A That's what I said. That's what he told me.

4 Q He told you that?

5 A Mr. Feldman told me that.

6 Q You have no idea why?

7 A Why Mr. Feldman told me?

8 Q You have no idea why Hayden, Stone paid
9 him?

10 A I don't know why they paid him. That
11 was their decision, Mr. Barist. I could speculate,
12 I suppose, on a lot of things, but I don't know why
13 they paid him. I have no way of knowing.

14 Q Did you have any reason to believe
15 that anyone other than yourself, Mrs. Foley, Mrs.
16 Salisbury, or J. P. Foley & Company, or any combination
17 of the four, would pay Mr. Feldman for his services
18 rendered in regard to the Blair transaction?

19 THE WITNESS: Would you read the
20 question, please?

21 (The pending question was read.)

22 A No, I had no guardian angel. If I
23 did, I didn't know him, Mr. Barist.

24 Q Did Mr. Feldman, to your knowledge,
25 ever receive any compensation for his services rendered

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with respect to the Blair transaction?

A Not as far as I know.

MR. BARIST: One of these days,

Mr. Milberg, you will have to tell me what
was the missing question I didn't ask.

MR. MILBERG: It may come out at the
trial. If you ask it in a form that can be
answered at the trial, maybe it will come out.
I know as much about it as you do, or as
little, I'll put it that way.

Q Is Mr. Feldman's compensation with
respect to the services rendered to you, rendered with
respect to the Blair transaction, in any way contingent
upon the success of any litigation presently pending?

A I have held no such discussion with Mr.
Feldman. He has not indicated that that is the
case, Mr. Barist.

MR. BARIST: Give me a couple of
minutes to look over some notes.

(A brief recess was taken at
this time.)

MR. BARIST: No further questions,
Mr. Milberg. Your witness.

MR. MILBERG: No questions.

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Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

Feldman

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567

2 suffer any loss for the pleasure of being a prospective
3 account, subordinated account.

4 So they made the suggestion to me, through
5 their counsel, and I mentioned it to Dr. Foley, and he
6 accepted the notion with alacrity, and decided that he
7 wanted to know no further about the matter. He asked
8 me if I would be satisfied with that, and I said I thought
9 so.

10 The question then arose as to how the fee
11 would be set, and I said I would accept Hayden, Stone's
12 counsel's evaluation, since I considered it a very
13 fair gesture. And much to my amazement, they were
14 far more generous than I ever expected them to be, and
15 that closed the matter, because I couldn't very well
16 justify any further charge to Dr. Foley.

17 Q Did you ever send Dr. Foley a bill for
18 the services rendered with respect to the Blair trans-
19 action? Did you ever bill him with respect to the
20 Blair transaction?

21 A No, not -- it never got off the ground, to
22 the point where I would have billed him, before the
23 damn thing exploded. And I felt it would have been in
24 very bad taste to have billed him for that at that
25 point.

Exhibit 1 Annexed to Reply Affidavit of David Hartfield, Jr.
Excerpts from Deposition Transcripts

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Feldman

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1
2 MR. BARIST: Why don't we break here
3 for lunch, if that's all right with you?
4

MR. MILBERG: It's okay with me.

5 (Luncheon recess taken at 12:30 p.m.)
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Letter from Mr. Milberg to Judge Tenney
Dated April 1, 1975

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MARTIN A. FROMER
LEONARD FELDMAN
COUNSEL

April 1, 1975

Honorable Charles H. Tenney
United States District Court
United States Courthouse
Foley Square
New York, New York

Re: Foley v. Vanderbilt, et al.,
70 Civ. 4194 (CHT)

Honorable Sir:

This letter is submitted in support of a request that the motion of the defendant Arthur Young & Co. to disqualify the firm of Milberg & Weiss as trial counsel for the plaintiffs in this matter, be set down for oral argument. The motion is now returnable on April 4, 1975.

I have this day been served with the reply affidavit of David Hartfield, Jr., submitted by the defendant Arthur Young, in support of its motion to disqualify. Mr. Hartfield's affidavit is replete with "statements of fact" and assertions which either find no factual support, or are based upon self-serving statements in the moving affidavit of Jeffrey A. Barist.

1) Mr. Hartfield states (Hartfield affidavit, p. 8) that my firm had consulted with Mr. Feldman concerning Foley prior to the consummation of the Foley/Blair transaction. This assertion is directly contradicted by those portions of the record which are attached to in the Hartfield affidavit. Dr. Foley testified (Foley deposition, p. 1114):

"that the first occasion on which Milberg & Weiss was at all involved in my situation was the occasion of the New York Stock

Letter from Mr. Milberg to Judge Tenney

Dated April 1, 1975

MILBERG & WEISS

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Honorable Charles H. Tenney
April 1, 1975
Page Two

Exchange arbitration, at which Mr. Milberg was present." (See also, Foley, p. 1118)

This arbitration took place on August 12, 1970, nearly five months after consummation of the Foley/Blair transaction. For my part, neither I nor anyone else in my firm ever heard of Foley or the Blair transaction prior to that time.

2) Mr. Hartfield contends that DR 5-101 mandates disqualification of Milberg & Weiss by reason of the fact that Milberg & Weiss knew at the time they undertook to represent Foley that Mr. Feldman had been the attorney for the Foleys in the Blair transaction. It does not follow from this that Milberg & Weiss had any reason at that time to believe that Feldman "ought to be" called as a witness. It took Messrs. Hartfield and Barist four years to reach this conclusion. Mr. Hartfield makes no reference to DR 5-102, which sets forth the circumstances in which counsel should withdraw from an action after undertaking representation. DR 5-102 requires withdrawal only in those circumstances where counsel "ought to be called as a witness on behalf of his client." It is not at all clear to me that Mr. Feldman will necessarily be called as a witness by plaintiffs in this action. In fact, he will not be called as a witness, except possibly in rebuttal to evidence which may be proffered by defendants. Authorities construing DR 5-101 et seq. have held this practice to be proper and no basis for disqualification.

3) Mr. Hartfield describes DR 5-101 and 5-102 as rules automatically requiring disqualification. This argument is inconsistent with the interpretations placed by the ABA on that rule as well as the decisional authorities thereunder, which state the rules are not intended to be strait-jackets and that disqualification is required only where the trial cannot be conducted fairly because of the dual role of the attorney as trial advocate and witness.

4) Mr. Hartfield baldly states that disqualification is mandated even where the attorney is called as a witness by the adverse party. The footnotes to the Disciplinary Rules specifically state that "it was not designed to permit a lawyer to call upon counsel as a witness, and thereby disqualify him as counsel." Canon 5, n. 31.

MILBERG & WEISS

Letter from Mr. Milberg to Judge Tenney
Dated April 1, 1975

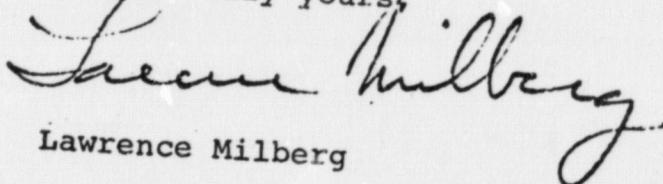
Honorable Charles H. Tenney
April 1, 1975
Page Three

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5) Mr. Hartfield states that Mr. Feldman has a contingency arrangement with the plaintiffs and that his compensation is dependent on the outcome of this litigation. Mr. Hartfield's supposed "facts" do not appear in the record. Dr. Foley has testified (Foley p. 1102 and see pps. 1111, 1115-1118 that "it was my understanding that I was going to pay him" for the transaction with Blair. In point of fact there is no factual basis whatever for Mr. Hartfield's suggestion. It is purely his own and his assertions are his own "testimony", not either Mr. Feldman's or Dr. Foley's. There is no factual basis buttressing Mr. Hartfield's statement.

The approach adopted in Mr. Hartfield's affidavit warrants that this motion be set down for oral argument. I therefore request that the court grant oral argument at a time which it may find convenient.

Respectfully yours,


Lawrence Milberg

LM:11

cc: To All Counsel

**Reply Affidavit of Lawrence Milberg in Opposition to
Motion to Disqualify**

JA 134

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

J.P. FOLEY, INC., JOHN P. FOLEY, JR.,
ANNE A. FOLEY and ANITA SALISBURY,

Plaintiffs,

70 Civ. 4194 (CHT)

-against-

REPLY AFFIDAVIT

OLIVER D. VANDERBILT, et al.,

Defendants.

X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

LAWRENCE MILBERG, being duly sworn, deposes
and says:

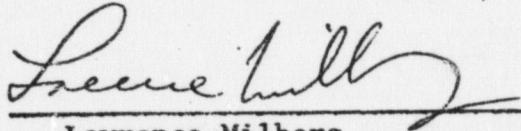
1. I am making this affidavit to reply to the suggestion found in Mr. Hartfield's affidavit (p 9) that Mr. Feldman consulted with Milberg & Weiss about the Foley-Blair transaction before its consummation on April 3, 1970. Mr. Hartfield reaches this conclusion because (a) Mr. Feldman was "counsel" to Milberg & Weiss; (b) Milberg & Weiss are securities experts; and (c) the answering affidavits do not specifically aver that "Mr. Feldman failed to consult with member of the firm." Mr. Hartfield's "logic" tries to prove a positive from the absence of a negative. His conclusion is inaccurate and unfounded. The fact is that Mr. Feldman did not consult with me or any member or associate of my firm concerning the Foley-Blair transaction until months after consummation of that transaction.

2. First, Dr. Foley has testified as follows
(Foley, p. 1114; Hartfield affidavit, Exhibit 1):

"I think that the first occasion in which Milberg & Weiss was at all involved in my situation was the occasion of the New York Stock Exchange arbitration at which Mr. Milberg was present."

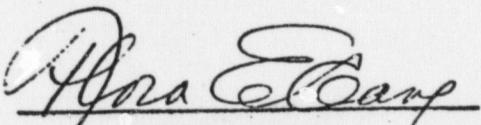
The arbitration took place on August 12, 1970 - some five months after the consummation of the Foley-Blair transaction. Second, neither I nor any member of my firm was introduced to Dr. Foley or had any knowledge of the Foley-Blair transaction until the time of the arbitration. In fact, it was not until that time that I had even heard the name "Foley".

3. Mr. Hartfield relies upon Mr. Barist's affidavit as "testimony" to support his proposition. In point of fact, Mr. Barist did not make any such statement. Furthermore, Mr. Feldman has never so testified. As is clear from the record, when Mr. Feldman was asked whether he had consulted with Milberg & Weiss, he objected to the question by stating that if there were such conversations, they would be protected by attorney-client privilege. This objection made in hypothetical terms is the only basis for Mr. Barist's and Mr. Hartfield's statement that Milberg & Weiss were consulted. We never were consulted. It is significant that after the privilege was waived and Mr. Feldman's deposition was renewed, neither Mr. Barist nor any other defendant in this litigation questioned Mr. Feldman further on this issue. There is not one scintilla of fact to support the statement of Messrs. Hartfield and Barist.



Lawrence Milberg

Sworn to before me this
2nd day of April, 1975



FLORA E. CAVE
Notary Public, State of New York
No. 24-0605450
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. P. FOLEY & CO., INC., JOHN P. FOLEY, :
ANNE A. FOLEY and ANITA SALISBURY,

Plaintiffs, :

70 Civ. 4194 (CIV)

-against-

OLIVER D. VANDERBILT, JAMES B. RAMSEY,
JR., THOMAS McNELL, BRUCE RAYMOND,
RICHARD McDERMOTT, WILLIAM CROSSCRUGER,
FRANK LYNCH, GEORGE MORPURGO, MELVILLE
H. IRELAND, JAMES J. RUSH, BLAIR & CO.,
INC., and ARTHUR YOUNG & COMPANY,

Defendants. :

MEMORANDUM

TENNEY, J.

Defendant Arthur Young & Company seeks an order of this Court pursuant to Rule "(c)" of the General Rules of this Court and Rule 15 of the local Civil Rules of this Court disqualifying the firm of Milberg & Weiss from further representation of the plaintiffs in this action. For the reasons set forth below, the motion is denied.

Defendant contends simply that Leonard Feldman, Esq. will, of necessity, be called as a witness on behalf of the plaintiffs herein and that, since Mr. Feldman is "of counsel" to the law firm representing plaintiffs, a disqualification is necessary in order to prevent the prejudice which would accrue where a lawyer becomes a witness in the action in which he is also an advocate. Defendant supports this allegation by citation to the

Opinion of the District Court

Code of Professional Responsibility, Disciplinary Rules 5-101(E) and 5-102(A).

Plaintiffs contend first that Mr. Feldman is not a member of its counsel, the law firm of Milberg & Weiss, in spite of the designation "of counsel". They maintain that this status does not place Mr. Feldman "in the firm". Secondly, they argue that Mr. Feldman will not be a witness. Plaintiffs have stated in their papers that they have no intention of calling Mr. Feldman during their affirmative case. The only potential use of his testimony that is foreseen at this time is the possibility that his testimony will be elicited in rebuttal to evidence offered by defendant. Finally, plaintiffs contend that to cause them to replace their counsel at this time would work a "substantial hardship" within the meaning of Disciplinary Rule 5-101(B)(4) of the Code of Professional Responsibility.

Disciplinary Rule 5-101(B) reads as follows:

"(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered

Opinion of the District Court

in the case by the lawyer or his firm to the client.

- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

Disciplinary Rule 5-102(A) reads as follows:

- "(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4)."

The testimony of a lawyer on behalf of his client is not incompetent *per se*. City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1369 (1st Cir. 1971); Bank of America v. Saville, 416 F.2d 265, 272 (7th Cir. 1969), *cert. denied*, 396 U.S. 1033 (1970); United States v. Fiorillo, 376 F.2d 180, 185 (2d Cir. 1967). The courts, however, have traditionally been reluctant to allow a lawyer to be called as a witness in a case in which he is also an advocate. United States v. Brown, 417 F.2d 1063, 1069 (5th Cir. 1969), *cert. denied*, 397 U.S. 993 (1970); Gajowski v. United States, 321 F.2d 261, 268 (8th Cir. 1963); United States v. Alu, 246 F.2d 29, 33 (2d Cir. 1957). Clearly, the thrust of the canons in this instance is the avoidance of prejudice at trial. Molded Plastic Box Company, Inc. v. Friction Polymers, Inc., 73 Civ. 3939 (S.D.N.Y. Dec. 3, 1974).

Opinion of the District Court

"The canons are concerned not only with the possible prejudice to the attorney's client, but also to potential prejudice to the attorney's adversary. The latter is placed in the peculiar position of having to deal with an opponent who is both an advocate and a material witness." Id. at 5.

Defendant relies primarily on the case of Draganescu v. First National Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974). That case is distinguishable on its facts from the instant case, although the paucity of cases in this area elevates its value for illustrative purposes. In Draganescu, plaintiffs' lawyer had represented them in the transactions leading up to the lawsuit. He was also to represent them at trial and was to appear as a material witness for plaintiffs. On these facts, the Court of Appeals for the Fifth Circuit held that a disqualification was proper since it found no substantial hardship would result therefrom.

Here, Mr. Feldman had represented plaintiffs in the transactions which led to the instant lawsuit. In this instance, however, he will take no part in the trial of the case. Even assuming arguendo that Mr. Feldman is "in the firm" of Milberg & Weiss,^{1/} it appears that the possibility of his being called as a witness is slight. Plaintiffs have stated to the Court in their papers that they do not intend to call him during their case-in-chief. The only possible need which can be foreseen at this time is the use of his testimony in rebuttal. His testimony, if needed at that time may be merely cumulative. It may be un-

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Opinion of the District Court

necessary.

This case has been handled by the Milberg & Weiss firm since its inception in 1970. It has involved substantial pre-trial discovery and preparation and, while the Court need not reach the question of whether a disqualification would work a substantial hardship at this time, it is clear that defendant has not made a sufficient showing to support a disqualification.

Accordingly, defendant's motion for disqualification is denied.

So ordered.

Dated: New York, New York

April 15, 1975

CHARLES H. TENNEY

U.S.D.J.

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Opinion of the District Court

J. P. FOLEY & CO., INC., et al.,
Plaintiffs,
-against-
OLIVER D. VANDERBILT, et al.,
Defendants.

70 Civ. 4194 (CMT)

FOOTNOTE

- 1/ There is no need for the Court to reach this issue at this time.

(4196)

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JUN 6 1975

ATTY. FOR: Foley
Barbara Catapano